85-403

NO.

Supreme Court, U.S.
FILED
SEP 4 1985
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1985

ZBIGNIEW SCHELLER,

Petitioner,

v.

AMERICAN MEDICAL INTERNATIONAL, INC., a foreign corporation for profit, PALM BEACH GARDENS COMMUNITY HOSPITAL, INC., a Florida corporation for profit, FREDERICK P. HOBIN, M.D., and T.R. BRUCE, JR.,

Respondents.

On Petition for Writ of Certiorari
To the Florida Supreme Court

PETITION FOR WRIT OF CERTIORARI

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18 pp

QUESTION PRESENTED

DID THE FLORIDA COURTS DEPRIVE PETITIONER OF HIS DUE PROCESS RIGHTS AND ACCESS TO THE COURTS WHERE THE APPELLATE COURT JUDGE WHO AUTHORED AN OPINION REVERSING A 7.25 MILLION DOLLAR AWARD IN HIS FAVOR AND DIRECTING A VERDICT AGAINST HIM WAS NEGOTIATING WITH AND DISCUSSING FUTURE EMPLOYMENT WITH ONE OF THE ATTORNEYS FOR THE OPPOSITION AND; SUBSEQUENT TO LEAVING THE BENCH, DID IN FACT GO INTO PARTNERSHIP WITH THAT ATTORNEY.

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

ZBIGNIEW SCHELLER,

Petitioner,

v.

AMERICAN MEDICAL INTERNATIONAL, INC., a foreign corporation for profit, PALM BEACH GARDENS COMMUNITY HOSPITAL, INC., a Florida corporation for profit, FEDERICK P. HOBIN, M.D., and T.R. BRUCE, JR.,

Respondents.

On Petition for Writ of Certiorari
To the Florida Supreme Court

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully requests that a Writ of Certiorari issue to review the opinions and orders of the Fourth District Court of Appeal of Florida and the Florida Supreme Court. Those decisions deprived Petitioner of his due process rights and access to the courts where the judge who authored the appellate decision reversing a 7.25 million dollar judgment in his favor was negotiationg with and discussing future employment with opposing counsel during the pendancy of the appeal before him, and subsequently left the bench and went into partnership with that counsel. These actions deprived Petitioner of having his case decided by a fair and impartial tribunal. Due process guaranties a tribunal free from partiality in fact or even the appearance of partiality.

RELEVANT OPINIONS AND ORDERS BELOW

1) The 7.25 million dollar Final Judgment in Petitioner's favor dated _____(Appendix A).

2) Fourth District's decision reversing the Final Judgment and ordering entry of Judgment in favor of Respondents (Appendix B).

3) Petitioner's Motion for Rehearing (Appendix C).

4) Petitioner's Motion to Vacate and/or Motion to Transfer and Supporting Affidavit (Appendix D).

5) Supplemental Affidavit in support of Motion to Vacate (Appendix E).

6) Fourth District's Order denying Motion to Vacate and/or Transfer (Appendix F).

7) Florida Supreme Court's Order denying Petitioner's Petition for Review (Appendix H).

JURISDICTION

The decision of Florida's Fourth District Court of Appeal, reversing the Final Judgment of the trial court, was entered on July 13, 1984 (Appendix B) and the court's denial of Petitioner's Motion for Rehearing and Motion to Vacate and/or Transfer was entered January 30, 1985 (Appendix F). Review was thereafter sought in the Florida Supreme Court where Petitioner argued a violation of his constitutional rights (Appendix G), The Florida Supreme Court declined to accept discretionary jurisdiction by

Order of June 6, 1985 (Appendix H). The Florida Supreme Court's rejection, for want of jurisdiction, of Petitioner's attempt to seek review in that court results in the decision of the Fourth District being rendered by the highest court of Florida in which review can be had. This Court's Jurisdiction is invoked pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS

The Constitutional provisions involved are:

The Fourteenth Amendment to the Constitution of the United States:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, *without due process of law;* nor deny to any person within its jurisdiction the equal protection of the laws. (U.S. Const., amend. XIV, §1.

Section 9, Article 1 of the Florida Constitution:

> No person shall be deprived of life, liberty or property *without due process* of law....

Section 21, Article 1 of the Florida Constitution:

> The courts shall be open to every person for redress of any injury and justice shall be

administered without sale, denial or delay.

THE CODE OF JUDICIAL CONDUCT

Canon 3-C(1)

> ...a Judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned.

STATEMENT OF THE CASE AND FACTS

UNDERLYING FACTS

Dr. Scheller was both a member of the Medical Staff of Palm Beach Gardens Hospital, a private "for-profit" hospital, and under contract with the Hospital as the Medical Director of the Hospital's Pathology Laboratory. The contract was ambiguous in that it not only provided that either party had the right to terminate it upon 90 days notice, but also that the Department of Pathology must be operated in accordance with the Medical Staff Bylaws. Dr. Scheller testified that the intent of this provision was to incorporate the Staff Bylaws into his contract. Article II of the Staff Bylaws provided that any physician holding a contract with the Hospital must be a member of the Active Medical Staff. This provision was adopted when AMI, a conglomerate that owned 60 hospitals throughout the world, first purchased Palm Beach Gardens Hospital.

The Hospital's staff physicians at the time of purchase had been reluctant to continue on the Staff of this for-profit Hospital unless they were allowed to retain control over matters relating to patient care. They did not want decisions within the Hospital dealing with patient

care to be made based upon profit motives. Therefore, it was agreed that the Medical Staff Bylaws would place decisions regarding patient care in the hands of the Medical Staff. One of the provisions that the Medicial Staff insisted upon was that a physician contracting with the Hospital to run a Department of the hospital must be a member of the Active Medical Staff, which allowed the Medical Staff the opportunity to observe the physician's competency for two years. If the Staff members determined a physician was unqualified, they could object to his admission to the Medical Staff and therefore his employment as a contract physician. Thus, this provision prevented the Hospital from contracting with incompetents to run its different Departments, such as Pathology, Radiology, etc., upon which the other physicians relied. The Medical Staff Bylaws also provided that the Staff members could designate someone other than the contract physician to do their pathology and radiology work, if they so desired.

Dr. Scheller had many disputes with the Hospital, its Administrator, and AMI over the way the Patholoigy Laboratory was being run because the Hospital failed to purchase equipment needed by the Lab; employees hired by the Hospital were unlicensed and incompetent, resulting in gross errors being made and inaccurate test results, and delays in getting test results. While the Hospital and AMI were cutting the Laboratory's budget, production within the Laboratory increased four to five times, with billings increasing from $450,000 to 2.5 million dollars.

Because Dr. Scheller was placing concern for patient care over "profit", he became a thorn in the side of the Hospital and AMI. Dr. Scheller's contract as Medical Director of the Pathology Laboratory was terminated and a physician who was not a member of the Active Medical

Staff was hired to replace him.

Dr. Scheller sued the Hospital for breach of contract, and AMI, the Hospital and the Hospital Administrator for tortious interference with the contract, and tortious interference with advantageous business relationship.

Even though Dr. Scheller had been fired as a contract physician, he was still a member of the Medical Staff and as such was entitled to be appointed the pathologist for any of the Staff members if they chose to use him instead of the Hospital's new contract physician. As a Staff member, he was also entitled to full use of the Hospital facilities pursuant to Article IV of the Medical Staff Bylaws.

> Regardless of an exclusive contract for pathology...a physician, with the consent of the medical staff, may designate a different medical expert in those fields; and that person so designated shall be afforded the *full use* of the Hospital facilities to do his routine work as requested, in which even the medical expert that does the work shall submit a medical fee statement to the patient or to the hospital, as the case may be and there will be no double billing.

During the pendency of this lawsuit the Hospital and AMI refused to allow Dr. Scheller to review and interpret test results performed on patients of doctors who had designated him as their pathologist. Dr. Scheller was required to obtain an injunction to prevent the Hospital and AMI from denying him access to the tests results.

The Hospital and AMI subsequently refused to give Dr. Scheller necessary billing information to bill his patients for the work he was performing. The trial court ruled that Dr. Scheller, as a staff physician, was entitled to this information and entered a second injunction to that effect.

This case was tried before a jury over a four week period. The jury resolved all factual issues in Dr. Scheller's favor as follows (see footnote 1 of Appendix B):

...(a) At the time PALM BEACH GARDENS COMMUNITY HOSPITAL, INC., entered into the contract with Fred Hobin, the Medical Staff Bylaws contained this provision: "Any physician holding a contract with the Hospital must be a member of the active Medical Staff?".
YES___X___NO_____
...(b) At the time they executed the contract on May 12, 1975, was it the intent of ZBIGNIEW SCHELLER and PALM BEACH GARDENS COMMUNITY HOSPITAL, INC., to incorporate that provision into their caontract?
YES___X___NO_____

(c) Was it the intent of the Hospital and the Medical Staff at the time the Bylaws were adopted that this provision meant that the Hospital could not contract with a physician until that physician had been a member of the Medical Staff for at least two years and had been elevated to Active Staff membership?
YES___X___NO_____

(d) Was this provision an essential and material term or condition of the contract?
YES___X___NO_____

(e) Did the Hospital violate this provision of the contract by entering into a contract with Fred Hobin who was not a member of the active Medical Staff?
YES___X___NO_____

The jury found against the Hospital for breach of contract, and against AMI and the Hospital Administrator for interference with contract and tortious interference with contract. The jury found that Dr. Scheller's compensatory damages were $1,250,000, and awarded $1,000,000 in punitive damages against the Hospital, $4,000,000 in punitive damages against AMI; and $1,000,000 in punitive damages against the Hospital Administrator.

FACTS RELEVANT TO CONSTITUTIONAL ISSUE PRESENTED

The Defendants appealed to the Fourth District Court of Appeal. Judge Beranek authored a decision which directed a verdict against Dr. Scheller on all counts, with one Judge dissenting. The decision was rendered on the last day of Judge Beranek's tenure in office. While this case was on rehearing, Dr. Scheller filed a Motion to vacate the Court's decision and/or transfer the case to another District Court for resolution because the Fourth District's decision had been authored by Judge Beranek, and it was subsequently discovered that while sitting on this case Judge Beranek had been discussing future employment with Larry Klein,[1] one of the attorneys representing Respondents; and that subsequent to leaving the bench, Beranek had in fact gone into partnership with Larry Klein

[1] After rendition of the Fourth District Court of Appeal's decision, Larry Klein filed a Notice of Withdrawal as Respondents' attorney.

(Appendix D & E). It was also discovered that Judge Beranek had recused himself from sitting on other law firm's cases while discussing future employment with those law firms, but had not recused himself from sitting on this case (Appendix D). The Fourth District denied Petitioner's Motion (Appendix F). Petitioner's Petition for the Florida Supreme Court to grant discretionary review was likewise denied (Appendix G).

REASONS FOR GRANTING THE WRIT

A party is entitled to the cold neutrality of an impartial judge; the law intends that no judge shall preside in a case which he is not wholly free, disinterested, impartial and independent. U.S. v. ORBIZ, 366 F.Supp 628 (D.C. Puerto Rico 1973); U.S. v. BOFFA, 513 F.Supp. 505 (D.C. Del. 1981).

This right to a tribunal free from partiality, bias or prejudice is a constitutional right based on the due process clause. U.S. v. SCIATO, 531 F.2d 842 (C.A. 111 1976); MILLIGAN V. STONE, 424 F. Supp 1088 (D.C. Cal 1976). A trial before an unbiased judge is *essential* to due process. U.S. v. BOFFA, *supra.*

A fair and impartial tribunal requires at least that the judge or tribunal hearing the case be impartial and that every appearance of complete fairness also be present. WALL v. AMERICAN OPTOMETRIC ASS'N, INC., 379 F. Supp 175, aff'd HARDIVICH v. WALL, 95 S.Ct. 166, 419 U.S. 888, 42 L. Ed.2d 134, reh. den. 95 S.Ct. 648, 419 U.S. 1061, 42 L.Ed.2d 659.

The appropriate test in determining whether a judge should disqualify himself is whether a reasonable person

knowing all of the circumstances would be led to the conclusion that the judge's impartiality might reasonably be questioned. SMITH v. PEPSICO, INC., 434 F. Supp. 524 (D.C. Fla. 1977). This standard is sufficiently broad enough to require recusal both in those circumstances where partiality is in fact present and where only the appearance of partiality is present. U.S. v. BOFFA, *supra.* Judges should clearly disqualify themselves to avoid the appearance, as well as the actual existence, of impartiality on their part. SPERRY RAND CORP. v. PENTRONIX INC., 405 F.Supp 367 (D.C. Pa 1975). The appearance of impartiality is virtually as important as the fact of impartiality. WEBBE v. McGHIE LAND TITLE CO., 549 F.2d 1358 (C.A. Utah 1977).

In the present case, Petitioner cannot be convinced, and will never be convinced, that he received a fair and impartial decision from the Fourth District Court of Appeal in light of the facts of this case. Confidence in our judicial system is the very frame work upon which it is built and must be scrupulously defended:

> ...It is a matter of no concern what judge presides in a particular cause, but is is a matter of grave conceren that justice be administered with dispatch, without fear or favor *or the suspicion of such attributes.* The outstanding big factor in every lawsuit is the truth of the controversy. Judges, counsel, and rules of procedure are secondary factors designed by the law as instrumentalities to work out and arrive at the truth of the controversy.
>
> The judiciary cannot be too circumspect, neither should it be reluctant to retire from a cause under circumstances that would shake the

confidence of litigants in a fair and impartial adjudication of the issues raised. DICKINSON v. PARKS, 140 So. 459 (Fla. 1932).

It is clear that Judge Beranek should not have continued to sit on this case once he began negotiations and discussions with oppposing counsel regarding the possibility of his leaving the bench and going into partnership with him. It is clear that at least an appearance of impropriety existed. This did not become known to Petitioner until Judge Beranek resigned and announced that he would be going into partnership with opposing counsel, Klein. Petitioner immediately filed a Motion to Vacate Judge Beranek's decision and transfer the case to another District court for resolution.[2] Judge Beranek's actions and the actions of the Florida appellate courts in denying Petitioner any relief constituted a denial of his due process rights. Petitioner was not required to prove actual prejudice, YOUNG v. U.S., 346 F.2d 793 (C.A. D.C.1965), only an appearance of impropriety, to be entitled to relief.

CONCLUSION

The Orders and opinions of the courts of the State of Florida clearly deprived the Petitioner of his due process rights by depriving him of an impartial tribunal to hear the

---

[2] Judge Letts (of the Fourth Distsrict Court of Appeal) stated in a specially concurring opinion to the Order Denying Petitioner's Motion to Vacate and/or Transfer that this issue was controlled by in RE ESTATE OF CARLTON, 378 So.2d 1212 (Fla. 1979) which he felt held that it was in the personal discretion of an appellate court judge to determine the sufficiency and the propriety of a request to withdraw. In this case, no motion to disqualify Judge Beranek was made because when the facts were discovered, he had already left the bench. Second, can anyone doubt that if the facts had been discovered while Beranek was still on the bench there would be any reasonable basis for refusing to withdraw from this case where Beranek was discussing future employment with one of the attorneys on the case.

appeal of a case where a jury had awarded him 7.25 million dollars. There is no question that Judge Beranek should have recused himself. There is no question that his actions in failing to do so at least created an appearance of partiality and impropriety. The Florida courts have totally ignored their own pronouncements regarding the requisite of an impartial tribunal, in fact and in appearance, to this country's administration of justice:

> Every litigant, including the State in criminal cases, is entitled to nothing less than the cold neutrality of an impartial judge. It is the duty of courts to scrupulously guard this right of the litigant and to refrain from attempting to exercise jurisdiction in any matter where his qualification to do so is seriously brought in question. The exercise of any other policy tends to discredit and place the judiciary in a compromising attitude which is bad for the admimistration of justice. (STATE ex rel MICKLE v. ROWE, 131 So. 331 (Fla. 1930)).

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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and
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305-686-8010
Attorneys for Petitioner

By:_____
EDNA L. CARUSO

CERTIFICATE OF SERVICE

I do hereby certify that three copies of the foregoing Petition has been served on all parties by United States Mail, first class, postage prepaid, this 4th day of September, 1985.

85-403

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APPENDIX A

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT, IN AND FOR PALM BEACH COUNTY, FLORIDA

CASE NO. 79-3358 CA (L) 01 F

ZBIGNIEW SCHELLER,

Plaintiff,

v.

AMERICAN MEDICAL INTERNATIONAL, INC., etc, et al,

Defendants.

FINAL JUDGMENT

This cause came on for trial before a duly empaneled jury, who having been first sworn in accordance with the law, heard the evidence and testimony, and thereupon rendered a verdict finding as follows:

1. The Defendant, FEDERICK P. HOBIN, M.D., is not liable to the Plaintiff.

2. The Defendant, PALM BEACH GARDENS COMMUNITY HOSPITAL, INC., a Florida corporation for profit, doing business at Palm Beach Gardens Community Hospital, 3360 Burns Road, Palm Beach Gardens, Florida, and served through its registered agent for service of process, C.T.Corp., 100 Biscayne Blvd., Miami, Florida,

is liable to the Plaintiff, ZBIGNIEW SCHELLER, for breach of contract, tortious interference with the contract between the Plaintiff and Palm Beach Gardens Community Hospital, Inc., and for tortious interference with an advantageous business relationship between the Plaintiff and certain members of the Medical Staff.

3. The Defendant, AMERICAN MEDICAL INTERNATIONAL, INC., a foreign corporation for profit, served through its registered agent for service of process, C.T. Corp., 100 Biscayne Blvd., Miami, Florida, is liable to the Plaintiff, ZBIGNIEW SCHELLER, for tortious interference with the contract between the Plaintiff and Palm Beach Gardens Community Hospital, Inc., and for tortious interference with an advantageous business relationship between the Plaintiff and certain members of the Medical Staff.

4. The Defendant, T. R. BRUCE, JR., served with process herein individually, at Palm Beach Gardens Community Hospital, 3360 Burns Road, Palm Beach Gardens, Florida, is liable to the Palintiff, ZBIGNIEW SCHELLER, for tortious interference with the contract between the Plaintiff and Palm Beach Gardens Community Hospital, Inc. and for tortious interference with an advantageous business relationship between the Plaintiff and certain members of the Medical Staff.

5. The total compensatory damages for which the Defendants are liable to the Plaintiff are in the amount of One Million Two Hundred Fifty Thousand Dollars ($1,250,000).

6. The Defendant, AMERICAN MEDICAL INTERNATIONAL, INC., is required to pay punitive damages to the Plaintiff in the amount of Four Million Dollars ($4,000,000).

7. The Defendant, PALM BEACH GARDENS COMMUNITY HOSPITAL, INC. , is required to pay punitive damages to the Plaintiff in the amount of One Million Dollars ($1,000,000).

8. The Defendant, T. R. BRUCE, JR., is required to pay punitive damages to the Plaintiff ion the amount of One Million Dollars ($1,000,000).

Accordingly, the Court does hereby enter a Final Judgment in favor of the Defendant, FREDERICK P. HOBIN, M.D., and against the Plaintiff, ZBIGNIEW SCHELLER, and as to the Defendant, FREDERICK P. HOBIN, M.D., the Plaintiff shall take nothing by this action and the aforesaid Defendant shall go hence with day.

Pursuant to the verdict rendered in this action, judgment is also hereby rendered against the Defendant, AMERICAN MEDICAL INTERNATIONAL, INC., and in favor of the Plaintiff, ZBIGNIEW SCHELLER, in the total sum of Five Million Two Hundred Fifty Thousand Dollars ($5,250,000), for which sum let execution issue.

Pursuant to the verdict rendered in this action, judgment is also hereby rendered against the Defendant, PALM BEACH GARDENS COMMUNITY HOSPITAL, INC., and in favor of the Plaintiff, ZBIGNIEW SCHELLER, in the total sum of Two Million Two Hundred Fifty Thousand Dollars ($2,250,000), for which sum let execution issue.

Pursuant to the verdict rendered in this action, Judgment is also hereby rendered against the Defendant, T. R. BRUCE, JR., and in favor of the Plaintiff, ZBIGNIEW SCHELLER, in the total sum of Two Million Two Hundred Fifty Thousand Dollars ($2,250,000), for which sum let execution issue.

The Court reserves jurisdiction for the purpose of taxing costs.

DONE AND ORDERED in Chambers at West Palm Beach, Palm Beach County, Florida, this 2nd day of June, 1980.

/s/Edward Rogers

Copies furnished:

Thomas A. Bratten, Esq.
Mercer K. Clarke, Esq.
Robert M. Montgomery, Jr., Esq.

APPENDIX B

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT JULY TERM 1984

AMERICAN MEDICAL INTERNATIONAL, INC., PALM BEACH GARDENS COMMUNITY HOSPITAL, INC., and T. R. BRUCE, JR.,

Appellants/
Cross Appellees,

v. CASE NO. 80-1650.

ZBIGNIEW SCHELLER and FREDERICK P. HOBIN,

Appellees/
Cross Appellants.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING PETITION AND, IF FILED, DISPOSED OF.

_____/

Opinion filed July 13, 1984

Appeal and cross appeal from the Circuit Court for Palm Beach County; Edward Rodgers, Judge.

Mark Hicks of Daniel & Hicks, Miami; Mercer K. Clarke of Smathers & Thompson, Miami; and Larry A. Klein, West Palm Beach, for appellants/cross appellees.

Edna L. Caruso and Montgomery, Lytal, Reiter, Denney & Searcy, P.A. West Palm Beach, for appellees/cross appellants.

BERANEK, J.

This is an appeal and cross appeal growing out of a complex intra-hospital battle between the corporation owning the hospital and at least some of the medical staff. Dr. Scheller, a pathologist previously under contract with the hospital as laboratory director, brought a suit which resulted in a substantial jury award. The defendants in the action were: Palm Beach Gardens Community Hospital, Inc.; American Medical International, Inc.; Mr. T. R. Bruce; and Dr. Hobin. The jury awarded Dr. Scheller $1,250,000 in compensatory damages under three theories as set forth in different counts. The theories of liability were: (1) breach of contract, (2) tortious interference with a contractual relationship, and (3) tortious interference with an advantageous business relationship. This amount ($1,250,000) was awarded against Palm Beach Gardens Community Hospital, American Medical International, Inc., and Mr. Bruce. The Parties stipulated that the jury could return a verdict for one amount on all three counts against all defendants. Under this stipulation as to the verdict, there is no break down as to how much the jury would have awarded for each count against the separate defendants. The jury also awarded Dr. Scheller punitive damages in the following amounts: (1) American Medical International--$4,000,000; (2) Palm Beach Gardens Community Hospital, Inc.--$1,000,000; and (3) Mr. T. R. Bruce, Jr. -- $1,000,000. Thus, the total amount awarded Dr. Scheller was $7,250,000, or $1,250,000 in compensatory damages, and $6,000,000 in punitive damages. On post-trial motions, the trial court vacated the punitive damages

award against Mr. Bruce and granted him a new trial.

The defendants have appealed and plaintiff has cross appealed. The theories of liability and the underlying facts are complex. Extensive pretrial pleadings and discovery and a three-week jury trial resulted in an appellate record of over 7,200 pages. Complimentary to the trial judge, no error is asserted as to any evidentiary rulings, jury instructions, or the form of verdict.[1] A summary of the facts follows.

---

[1] The verdict returned by the jury was as follows:

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT, IN AND FOR PALM BEACH COUNTY, FLORIDA

CASE NO. 79-3358 CA (L) 01 F

ZBIGNIEW SCHELLER,
Plaintiff,
vs.
AMERICAN MEDICAL INTERNATIONAL, INC., a foreign corporation for profit, PALM BEACH GARDENS COMMUNITY HOSPITAL, INC., a Florida corporation for profit, FREDERICK P. HOBIN, M.D., and T. R. BRUCE, JR.,
Defendants.
_____/

VERDICT

We, the Jury, find the following:

1. As to Count II for breach of the written contract,do you find that:

(a) At the time PALM BEACH GARDENS COMMUNITY HOSPITAL, INC., entered into the contract with Fred Hobin, the Medical Staff Bylaws contained this provision: "Any physician holding a contract with the Hospital must be a member of the active Medical Staff?"

YES___X___ NO_____

Dr. Scheller -- the plaintiff, a hospital pathologist who sued for breach of his employment contract and for tortious interference with contractual and business relationships. Although no longer director of the pathology lab, the doctor remained on the hospital staff.

Palm Beach Gardens Community Hospital, Inc. (hospital)

--the defendant/hospital where Dr. Scheller was (and is) on the medical staff.

_____(Footnote 1 continued)

If your answer to 1(a) above was YES, then answer the following question:

(b) At the time they executed the contract on May 12, 1975, was it the intent of ZBIGNIEW SCHELLER and PALM BEACH GARDENS COMMUNITY HOSPITAL, INC., to incorporate that provision into their contract?
YES___X___ NO_____

If your answer to 1(b) was YES, then answer the following question:

(c) Was it the intent of the Hospital and the Medical Staff at the time the Bylaws were adopted that this provision meant that the Hospital could not contract with a physician until that physician had been a member of the Medical Staff for at least two years and had been elevated to Active Staff membership?
yes___X___ NO_____

If your answer to 1(c) above was YES, then answer the following question:

(d) Was this provision an essential and material term or condition of the contract?
YES___X___ NO_____

If your answer to 1(d) above was YES, then answer the following question:

T. R. Bruce, Jr. -- a defendant, the hospital's fulltime administrator.

Dr. Hobin-- a defendant, the pathologist hired to replace Dr. Scheller. This physician was not on staff for two years before being hired but was employed earlier by the hospital.

American Medical International, Inc. -- the parent corporation and 100% stockholder of the hospital. (AMI).

_____(Footnote 1 continued)

(e) Did the Hospital violate this provision of the contract by entering into a contract with Fred Hobin who was not a "member of the active Medical Staff?"
YES___X___ NO_____

2. If you find the Defendant, PALM BEACH GARDENS COMMUNITY HOSPITAL, INC., liable to the Plaintiff for breach of contract, then state the amount of compensatory damages sustained by the Plaintiff as a consequence of such conduct: *$1,250,000.00.*

3. Do you find the defendant, AMERICAN MEDICAL INTERNATIONAL, INC., liable to the Plaintiff for:

(a) Tortious interference with the contract between the Plaintiff and PALM BEACH GARDENS COMMUNITY HOSPITAL INC.,?
YES___X___ NO_____

(b) For tortious interference with an advantageous business relationship between the Plaintiff and certain members of the Medical Staff?
YES___X___ NO_____

4. Do you find the Defendant, T.R. BRUCE, JR., liable to the Plaintiff for:

(a) Tortious interference with the contract between the plaintiff and PALM BEACH GARDENS COMMUNITY HOSPITAL, INC.,"
YES___X___ NO_____

(b) For tortious interference with an advantageous business relationship between the Plaintiff and certain members of the Medical Staff?
YES___X___ NO_____

In 1970, the AMI Corporation purchased the hospital. The AMI Corporation owns numerous health care facilities, and the corporation and the hospital are both in business for profit. On May 12, 1975, Dr. Scheller, a pathologists, signed an employment contract as laboratory director with the hospital effective July 18, 1975. Dr.

_____(Footnote 1 continued)

5. Do you find the Defendant, FREDERICK P. HOBIN, M.D., liable to the Plaintiff for:

(a) Tortious interference with the contract between the Plaintiff and PALM BEACH GARDENS COMMUNITY HOSPITAL, INC.,?

YES_____ NO___X___

(b) For tortious interference with an advantageous business relationship between the Plaintiff and certain members of the Medical Staff?

YES_____ NO___X___

6. Do you find the Defendant, PALM BEACH GARDENS COMMUNITY HOSPITAL, INC., liable to the Plaintiff for:

(a) Tortious interference with an advantageous business relationship between the Plaintiff and certain members of the Medical Staff?

YES___X___ NO_____

7. If one or more of the Defendants have been found liable for tortious interference with the contract between the Plaintiff and PALM BEACH GARDENS COMMUNITY HOSPITAL, INC., then state the amount of compensatory damages sustained by the Plaintiff as a consequence of such conduct: *$1,250,000.00.*

8. If one or more of the Defendants have been found liable for tortious interference with an advantageous business relationship between the Plaintiff and certain members of the Medical Staff, then state the amount of compensatory damages sustained by the Plaintiff as a consequence of such conduct; *$1,250,000.00.*

9. If you have found the Defendant, AMERICAN MEDICAL INTERNATIONAL, INC., liable to the Plaintiff for any of the alleged acts (that is, if you answered "YES" to 3(a), or (b), then do you find that AMERICAN MEDICAL INTERNATIONAL, INC., is required to pay punitive damages, and, if so, what is the amount of punitive damages fixed by you?

PUNITIVE DAMAGES-YES___XC___

NO _____

AMOUNT: *$4,000,000.00*

Scheller was already a member of the medical staff of the hospital before he signed this contract as laboratory director. A great deal of controversy occurred regarding the operation of the pathology lab both before and after Dr. Scheller took over. Mr. T. R. Bruce, Jr., was the full-time administrator of the hospital, and on May 29, 1979, he sent Dr. Scheller a letter terminating the doctor's employment contract effective as of September 1, 1979. *This* termination is *not* asserted as a breach of contract nor does Dr. Scheller contend it to be otherwise improper. However, on May 31, 1979, the hospital hired Dr. Hobin to replace Dr. Scheller as the hospital pathologist. It was the hiring of Dr.

_____(Footnote 1 continued)

10. If you have found the Defendant, T. R. BRUCE, JR., liable to the Plaintiff for any of the alleged acts (that is, if you answered "YES" to 4(a) or (b), then do you find that T.R. BRUCE, JR., is required to pay punitive damages, and, if so, what is the amount of punitive damages fixed by you?

PUNITIVE DAMAGES--YES___X___

NO _____

AMOUNT: *$1,000,000.00.*

11. If you have found the Defendant, PALM BEACH GARDENS COMMUNITY HOSPITAL, INC., liable to the Plaintiff for tortious interference with an advantageous business relationship (that is, if you answered "YES" to 6(a), then do you find that PALM BEACH GARDENS COMMUNITY HOSPITAL, INC., is required to pay punitive damages, and, if so, what is the amount of punitive damages fixed by you?

PUNITIVE DAMAGES--YES___X___

NO _____

AMOUNT:$1,000,000.00

SO SAY WE ALL.

DATED this 31st day of *May*, 1980, at West Palm Beach, Palm Beach County, Florida.

/s/Bart Kelleher

Foreperson

Hobin which *is* asserted to be a breach of contract and to have otherwise contravened Dr.Scheller's rights. On August 21, 1979 Dr. Scheller filed the suit involved in this appeal. Dr. Scheller was still on the medical staff of the hospital at the time and is still so employed with full privileges in clinical and anatomical pathology. Although Dr. Scheller was no longer director of the laboratory, he was chosen and designated by numerous doctors on the medical staff of the hospital as their own special medical expert in the pathology.[2] During the course of Dr. Scheller's continued practice in the hospital and while the lawsuit was pending he secured at leasts two injunctions against the hospital. The hospital had barred the doctor from certain internal records and from certain aspects of the laboratory. The injunctions required the hospital to give Dr. Scheller full access to the laboratory and the records. In May, 1980, the trial in the instant case occurred.

The defendants raise four points on appeal. Point I relates to the breach of contract theory while Points II and III concern tortious interference with a contract and an advantageous business relationship. Point IV addresses damages. The plaintiff's cross appeal contests the new trial granted to defendant Bruce.

The breach of contract theory is attacked as a matter of law in defendants' first argument which urges error in the court's denial of motions for directed verdict. The theory of liability and the attack thereon require reference

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[2] 2. A provision in the medical staff bylaws allowed any staff doctor to designate an outside specialist in pathology or radiology. Dr. Scheller was so designated by a substantial number of staff doctors and thus continued to practice extensively as a pathologist in the hospital despite the fact he was no longer lab director.

to the employment contract and the bylaws of the medical staff. Dr. Scheller's employment contract contained 19 clauses. The last clause dealt with termination of the contract and provided as follows:

> The term of this Agreement shall be for a period of three (3) years...and continuing from year to year thereafter unless terminated as herein provided, provided, however, *that either of the parties hereto shall have the right and privilege of cancelling and terminating this Agreement upon ninety (90) days written notice to the other.* Upon the expiration of said notice, this Agreement shall be and become of no further force or effect whatsoever and each of the parties hereto shall be relieved and discharged herefrom. (Emphasis supplied.)

Based on Clause Nineteen, which both parties agree is unambiguous, defendants assert the contract was terminable without cause upon ninety days' notice to plaintiff. They maintain that Dr. Scheller was given due notice and his contract terminated. As such, defendants contend the trial court should have directed a verdict in their favor, and that damages for breach of contract should not have been submitted to the jury. Naturally, plaintiff disagrees, and in doing so relies upon Clause Seven of the same employment contract which provides as follows:

> SEVENTH--INDEPENDENT CONTRACTOR: In the performance of the work, duties and obligations devolving upon PATHOLOGIST under the terms of this Agreement, it is mutually understood and agreed that PATHOLOGIST shall, at all times, act and perform as an

> independent contractor practicing the profession of medicine and surgery and specializing in Pathology. HOSPITAL shall neither have nor exercise any control or direction over the methods by which PATHOLOGIST or those assistants, associates or partners of PATHOLOGIST shall perform their work and functions; the sole interest and responsibility of HOSPITAL is to assure that the DEPARTMENT and services covered by this Agreement shall be performed and rendered in a competent, efficient and satisfactory manner. The standards of medical practice and professional duties of PATHOLOGIST shall be determined by the Medical Staff of HOSPITAL. All applicable provisions of law and other rules and regulations of any and all governmental authorities relating to licensure and regulation of physicians and hospitals and to the operation of DEPARTMENT shall be fully complied with by the parties hereto; in addition, *the parties shall also operate and conduct the DEPARTMENT in accordance with* the standards and recommendations of the Joint Commission on Accreditation of Hospitals, the By-Laws of HOSPITAL, and the *By-Laws,* Rules and Regulations *of the Medical Staff of HOSPITAL as may be in effect from time to time.* (Emphasis supplied.)

On the basis of Clause Seven, plaintiff contends that the parties intended to incorporate the by-laws of the medical staff into the employment agreement. Plaintiff introduced the by-laws into evidence and by special interrogatory the jury concluded the parties did intend to incorporate these by-laws into the employment contract. The

by-laws, a 75-page document, provide a lengthy statement of policy and procedures governing all aspects of medical practice in the hospital. Article IV concerns staff membership and provides that a "contract physician" must be a member of the "active staff." A physician could not, under the by-laws, become a member of the active staff until he or she had spent one year on the privilege staff and one year on the associate staff. Thus, plaintiff contends his employment contract, as supplemented by the by-laws, was breached when the hospital hired Dr. Hobin to replace him, because Dr. Hobin had not been on the medical staff for two years immediately preceding his hiring and had not attained "active staff" member ship.[3] According to plaintiff's theory, he could not be replaced until two years after another pathologist had been on staff and this was almost impossible because economic reality would not allow another doctor to work as a pathologist for two years while the hospital ran its own laboratory in competition with him. Defendants characterize this as plaintiff's "lifetime contract" theory. Plaintiff sought damages before the jury measured by compensation he would have received under the terms of his contract until his probable retirement at age 65, a period of roughly 25 years. On appeal Dr. Scheller seems to disavow the "lifetime contract" theory but at the same time argues:

> [h]e was given great security)i.e.), a contract with termination conditions that would allow him to remain as Laboratory Director as long as he chose, because of the practical restrictions on his

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[3] Dr. Hobin had previously been the director of the hospital laboratory but had left the hospital's employment prior to Dr. Scheller's signing his initial contract on May 12, 1975.

> replacement. Accordingly,...his damages could be assessed anywhere from two years...to retirement (age 65). That was for the jury to determine. (Appellee's Brief p. 36).

The defendants' arguments against the contract theory are: (1) that there was no ambiguity, (2) if an ambiguity existed, it had to be resolved against plaintiff as a matter of law, (3) the contract was void for lack of mutuality, and (4) damages were unproven and not recoverable. We conclude that these arguments have merit and that the trial court erred in simply submitting all matters to the jury as issues of fact for their determination. The court should have first employed the established rules of contractual construction and, based thereon, directed a verdict for defendants on the breach of contract count. Here, the burden of initially construing the contract was improperly shifted entirely to the jury. This court has stated the rule to be:

> Where, as in the instant case before this court, a contract is clear and unambiguous and does not involve any absurdities or contradictions, it is the best evidence of the intent of the parties, and its meaning and legal effect are questions of law for *determination by the court alone* [citations omitted] (emphasis added). *Innkeepers International, Inc. v. McCoy Motels, Ltd.*, 324 So. 2d 676, 678 (Fla. 4th DCA 1976).

The two clauses in the employment contract, No. Seven governing independent contractors and No. Nineteen governing termination, were unambiguous and unrelated. It was improper to rule that the entire contract became totally ambiguous and totally subject to construction and interpretation by the jury by virtue of the incorporation of

the by-laws which contained everything but "the kitchen sink."

Even indulging the argument that the contract was subject to construction, the eventual result remains the same under other established rules of contract law. A true ambiguity does not exist merely because a contract can possibly be interpreted in more than one manner. Indeed, fanciful, inconsistent, and absurd interpretations of plain language are always possible. It is the duty of the trial court to prevent such interpretations. In *Paddock v. Bay Concrete Industries, Inc.*,154 So. 2d 313 (Fla. 2d DCA 1963), the court stated as follows at 316:

> Looking to the other provisions of a contract and to its general scope, if one construction would lead to an absurd conclusion, such interpretation must be abandoned and that adopted which will be more consistent with reason and probability.

Further in *James v. Gulf Life Ins. Co.*, 66 So.2d 62, 63 (Fla. 1953), the court stated:

> The inconvenience, hardship, or absurdity of one interpretation of a contract or its contradiction of the general purpose of the contract is weighty evidence that such meaning was not intended when the language is open to an interpretation which is neither absurd nor frivolous and is in agreement with the general purpose of the parties.

A 90 day termination provision and a lifetime contract provision are most obviously inconsistent.

> If clauses in contract appear to be repugnant to each other, they must be given such an interpretation and construction as will reconcile them, if possible, and if one interpretation would lead to an absurd conclusion, then such interpretation should be abandoned and the one adopted which would accord with reason and probability. *Triple E Development Co. v. Floridagold Citrus Corp.*, 51 So.2d 435 (Fla. 1951).

Dr. Scheller's theory of construction renders clauses seven and nineteen irreconcilable and totally destroys the unamibiguous language (in the actual contract) in both clauses. The general scope and intent of the contract was obviously not to confer a lifetime benefit on Dr. Scheller. The jury should not have been allowed to render totally ineffectual the clear termination provisions of the contract.

The most compelling argument against the plaintiff's position is the appalling lack of mutuality in the contractual relationship which plaintiff constructs from the combined interplay of the contracts and the by-laws. Under plaintiff's construction, he has a lifetime contract at an established rate of compensation; however, did the hospital have any corresponding rights, that is, could the hospital legally rely on Dr. Scheller's staying as lab director at the same rate of pay for the rests of his life? If Dr. Scheller had chosen to retire early at age 55 and given 90 days' notice, could the hospital have collected the same damages from him? We think not. If for no other reason, the contract as constructed by plaintiff is void for lack of mutuality. In sum we find no breach of contract as a matter of law.

The plaintiff's second theory of recovery, intentional interference with the contract, must fail for the same

reasons as outlined above. Under this count plaintiff relies on the same lifetime contract asserting interference rather than breach. Plaintiff's liability theory was that AMI and Mr. Bruce interfered with his contract with the hospital. Plaintiff proposed a "two hat theory" whereby Bruce (the hospital administrator) interfered with his own hospital's contract while wearing a separate AMI hat. We have previously held that the plaintiff's theoretical "lifetime--no replacement" contract simply did not exist. It is *this* contract which was supposedly interfered with. The elements of the tort of intentional interference are: 1) the contract; 2) the wrongdoer's knowledge thereof; 3) his intentional procurement of its breach; 4) the absence of justification; and 5) damages. *See Smith v. Ocean State Bank*, 335 So.2d 643 (Fla. 1st DCA 1976). Here the contract was one which could be terminated by either party without cause on 90 days' notice. There was no breach of this contract even if we indulge the "two hat theory." Plaintiff's proofs did not establish the basic elements of the cause of action and the court should have also directed a verdict on this count

The third count, intentional interference with a business relationship, is, however, entirely different. Under this count, Dr. Scheller does not complain about the termination of his employment as lab director nor about his replacement by Dr. Hobin. Instead, Dr. Scheller contends that AMI, Bruce, Hobin, and the hospital interfered with the business relationship he established with the other physicians on the medical staff after he was terminated as lab director. Once again, the theory and the facts are somewhat complex. After Dr. Scheller's employmesnt as lab director terminated, some 63 physicians designated him to perform pathology services for their patients. These doctors were entitled to do so under a staff by-law which provided:

> Regardless of an exclusive contract for Pathology, Radiology or the like, a physician with the consent of the Medical Staff may designate a different medical expert in these fields; and that person so designated shall be afforded the full use of the hospital facilities to do his routine work as requested, in which event the medical expert that does the work shall submit the medical fee statement to the patient or the hospital, as the case may be, and there will not be a double billing.

It would appear this by-law was designed to give physicians practicing in the hospital the option of associating an outside pathologist or outside radiologist to function in specific cases in place of the hospital pathologist or radiologist. If a surgeon wished, he could have his radiology work done by an outside physician who was not on the medical staff by designating that outside radiologists as a special medical expert under the by-law. When Dr. Scheller was terminated as lab director, he not only remained on the staff but was designated by 63 physicians as their own special expert. As such, Dr.Scheller went into competition with Dr. Hobin who was operating the hospital's pathology laboratory. Under the by-law, Dr. Scheller was entitled to "the full use of the hospital facilities to do his routine work." Dr. Scheller claimed at trial that AMI, Bruce, Hobin, and the hospital intentionally interfered with his business relationship with these physicians by denying him copies of the hospital's computerized bills and by barring access to the clinical laboratory.

The elements of a cause of action for intentional interference with an advantageous business relationship are: (1) the existence of an advantageous relationship under

The elements of a cause of action for intentional interference with an advantageous business relationship are: (1) the existence of an advantageous relationship under which the plaintiff has legal rights, (2) an intentional and unjustified interference with that relationship, and (3) damage to the plaintiff as a result of the defendant's actions. *Wackenhut Corp. v. Maimone,* 389 So.2d 656 (Fla. 4th DCA 1980). Here, the defendants refused to allow plaintiff to review and interpret test results relating to patients of doctors who had designated Dr. Scheller as their own pathologist. Dr. Scheller was also initially excluded from practicing clinical pathology in the laboratory being run by Dr. Hobin. Indeed, Dr. Scheller went to court in separate suits and obtained two injunctions to prevent the defendants from denying him access to test results and to the clinical laboratory facilities. Both of these injunctions were issued shortly before the main trial took place. The jury was not advised of the injunctions, but appellee has placed heavy reliance on the injunctions in argument before this court. No one has raised the question of how Dr. Scheller can get *damages* for future interference when that very interference has been twice enjoined by the court in suits between the same parties. Since this issue has not been raised, we do not further address it.

The arguments which defendants do raise are basically factual in nature. They point out that it is uncontested that no physician abandoned or even restricted his business relationship with Dr. Scheller even though the doctor asserts that his own performance was made more difficult or burdensome by the "billing" and "access" problems created by the hospital. In short, the doctor contends the hospital interfered by hindering his performance while the hospital contends he was merely "inconvenienced." The doctor argues that the two injunctions show how

bad the "inconvenience" really was, and the hospital urges we should disregard the injunctions because they occurred in different lawsuits and were not admissible before the jury. We are in agreement with the defendants' overall position on this issue. The evidence was that no doctor breached his relationship with the plaintiff. Unsuccessful interference is simply not the kind of interference upon which a tort may be founded or upon which damages may be assessed. In the context of this case, the fact that no doctor abandoned or breached the existing relationship with Dt. Scheller was of crucial significance. Since the relationships between Dr. Scheller and the 63 designating physicians remained intact, there was no cause of action proved and the court should have also directed a verdict on Count III.

In summary, we conclude that the court should have directed verdicts on counts I, II and III. The final judgment below is thus reversed. We do not determine the cross appeal because it is rendered moot by the foregoing opinion.

REVERSED.

SMITH, RUPERT JANSEN, Associate Judge, dissenting.

I respectfully and strongly disagree with the majority opinion rendered in this case. I think there was a breach of contract by the Defendant Hospital and its Administrator Bruce on two counts.

First, the Hospital hired Dr. Frederick P. Hobin before Dr. Zbigniew Scheller's 90 day had expired, this is simple.

The second breach is more complex, it is my view that the trial court did err. The court should have decided there was a breach of contract concerning the hiring of submitting that question to the jury -- there was no dispute that Dr. Hobin was hired by the hospital prior to the year probation period contained in the staff bylaws and, therefore under the modern view, the staff bylaws become a contract with the staff physicians when approved by the governing body of the hospital.

Florida Statute 395 and Rule 10D-28.58, Florida Administrative Code Annotated, adopted by the Department of Health and Rehabilitative Services, states:

> "10D-28.58 MEDICAL STAFF. Each hospital shall have a medical staff organized under written bylaws approved by the governing authority and responsible to the governing authority of the hospital for the quality of all medical care provided to patients in the hospital and for the ethical and professional practices of its members."

It is to be noted that the Joint Committee on Hospital Accreditation also requires the medical staff to have its own bylaws.

The modern view holds that the medical staff bylaws, when approved by the governing board of the hospital, become a contract between the hospital, operated by a Governing Board and the physicians composing the medical staff. See the following cases: *Berberian v. Lancaster Osteopathic Hospital Association,* 395 Pa. 257, 149 A.2d 456 (1959); *Joseph v. Passaic Hospital Association,* 26 N.J. 557, 141 A.2d 18 (19__); *Miller v. Indiana Hospital,* 277 Pa. Super. 370, 419 A.2d 1191 (1980); *The Anne*

Arundel General Hospital, Inc., et al., v. O'Brien, et al., 49 Md. App. 362, 432 A.2d 483 (1981): *St. John's Hospital Medical Staff v. St. John Regional Medical Center, Inc.*, 90 S.D. 674, 245 N.W.2d 472 (1976); *O'Leary, et al., v. Board of Director, Howard Young Medical Center, Inc., et al.*, 89 Wis.2d 156, 278 N.W.2d 217 (1979).

In the Passaic Hospital case cited above the Court held:

> "The medical staff bylaws were ratified by the Board of Governors, and thereby became a constituent part of the association's elemental law."

Also, in The Anne Arundel Hospital case, the Court stated:

> "It is well settled that hospital bylaws have the force and effect of an enforceable contract."

The next question to be answered is, do they enure to the benefit of individual staff members, i.e., doctors, or do they enure to the staff association? In areas that affect the physicians collectively the law provides that the bylaws would apply collectively; in those areas that affect an individual physician the law provides that the staff bylaws would apply individually.

Since bylaws are a contract between the physicians and the hospital, the hospital without question breached the contract (staff bylaws which in this case enured to Dr. Scheller)! The trial judge should have submitted the issue of damages to the jury for determination of breach of contract. Since the trial judge submitted the issue of whether there was a factual breach of contract to the jury for

determination and the jury answered that question in the affirmative, as should have the trial judge, this error is harmless.

The next question is the amount of actual damages -- it is to speculative to allow the jury to award damages to age 65 for Dr. Scheller. I would send this question back to the jury for the sole determination of actual damages for the breach of contract. It is my suspicion that the jury awarded Dr. Scheller the $1,250,000.00 as an indication that the community will not tolerate hospital administrators to treat the staff physicians in such a cavalier manner.

The punitive damages should be disallowed and a new trial should be granted on the issue of punitive damages, unless the plaintiff accepts a remittitur of 50 per cent on all awards of punitive damages including Mr. T. R. Bruce's, in my opinion, it was error for the trial judge to set his award aside, especially since he was the driving force behind this controversy. Administrators of hospitals should be aware that the law will not allow them dictatorial powers! My further belief is the jury allowed these punitive damage awards as a message to hospitals everywhere that the public will not endure below standard laboratories and other facilities in hospitals, especially after physicians have complained about conditions. Who else should complain except the physicians who are charged with seeing that high standards of health care are maintained, not only does the law require this of the doctors, also their staff bylaws, their code of ethics and also by various accreditaion committees recommendations.

The reasoning for reducing the punitive damage awards by 50 per cent is that the amounts shock my

judicial conscience -- while the hospitals will pay this amount, the ultimate burden will be on the patients of these hospitals, it is unrealistic to deny that the hospital corporation will not pass some of these amounts on as increased patient costs, however, there was ample evidence to justify punitive damages.

The other theories of liability are immaterial in view of this holding.

APPENDIX C

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

Case No. 80-1650

AMERICAN MEDICAL INTERNATIONAL, INC., et al.,

Appellants,

v.

ZBIGNIEW SCHELLER,

Appellee.

MOTION FOR REHEARING

ZBIGNIEW SCHELLER files this Motion for Rehearing and as grounds therefor would show:

This Court has overlooked or misapprehended the following in regard to each of the three Counts upon which this Court directed a verdict.

COUNT III - TORTIOUS INTERFERENCE

This Court has committed a *critical error* in deciding this case. The judgment in favor of Dr. Scheller on Count III of the complaint has been reversed by the court because in the language of the Court's opinion:

> The evidence was that no doctor breached his relationship with the plaintiff. Unsuccessful interference is simply not the kind of interference upon which a tort may be founded or upon which

damages may be assessed. In the context of this case, the fact that no doctor abandoned or breached the existing relationship with Dr. Scheller was of crucial significance. Since the relationship between Dr. Scheller and the 63 designating physicians remained intact, there was no cause of action proved and the court should have also directed a verdict on Count III.

The statement that "the relationships between Dr. Scheller and the 63 designating physicians remained intact" is absolutely wrong:

1. The relationships were completely terminated by the Defendants' actions in denying Dr. Scheller access to the clinical laboratory until the issuance of the first injunction.

2. The first injunction permitted reestablishment of the relationships until they were again completly terminated by the Defendants' actions in denying Dr. Scheller billing information until the issuance of the second injunction.

3. Since *at the Defendants' insistence* the jury never heard about either injunction, the record established by the admitted evidence created the fiction that the relationships remained terminated as a consequence of the Defendants' interference.

There may not have been any evidence that any of the 63 physicians stopped designating Dr. Scheller as their pathologist, but without access to the clinical laboratory and the necessary billing information, the jury properly concluded that Dr. Scheller was prevented from fulfilling the responsibilities of those designations and from

obtaining compensation for whatever services he could still render. No doctor breached his relationship with Dr. Scheller, but Dr. Scheller was forced to breach.

RELEVANT FACTS AS TO COUNT III

Separate and apart from Dr. Scheller's position as the Hospital's pathologist, he was also a member of the Medical Staff at the Hospital and as such had the right to laboratory test results and the right to billing information pursuant to the Medical Staff Bylaws. After being terminated as the Director of Pathology, Dr. Scheller continued to exercise his position as a member of the Medical Staff doing the pathology work for 63 of the doctors who treated 75% of the patients admitted to the Hospital. Defendants were not satisfied with termination Dr. Scheller as Director of Pathology, but were determined to destroy his privileges guaranteed by the Medical Staff Bylaws in order to wrongfully gain complete economic control of the Hospital's pathology department. They did this by refusing to give Dr. Scheller billing information and access to the results of the tests run in the pathology laboratory. Dr. Scheller had to obtain several temporary injunctions in order to exercise his staff privileges.

Count III of Dr. Scheller's Complaint sought damages from Defendants for these activities. Dr. Scheller alleged tortious interference with his advantages business relationship with the other doctors and with his patients, and sought both compensatory and punitive damages. At the time of trial, Dr. Scheller was allowed to continue exercising his rights as a member of the Medical Staff only

because of, and subsequent to, the temporary injunction.[1] Until the injunctions were issued he lost his staff privileges. And the jury never heard about the injunctions.

At trial counsel for Dr. Scheller wished to make the jury aware of the fact that Dr. Scheller was still a member of the Medical Staff, but was exercising his staff privileges solely as a result of the temporary injunctions. Defendants did not want the jury to be apprised of the temporary injunctions that had been repeatedly entered, because they knew that this would inflame the jury and most probably result in a high award of punitive damages. Defendants were successful in preventing the jury from knowing about the injunctions.

Defendants first objected to mentioning the injunctions during voir dire and moved for a mistrial. Counsel for Plaintiff had argued to the jury that it was necessary to seek court orders to enforce Dr. Scheller's ability to use the laboratory facilities and his right to billing information (T4113-4114). Defendants convinced the trial court that it was prejudicial error to advise the jury of the injunctions. The court agreed and granted a mistrial (T4118-4153).

Thus, a new jury was impanelled and the "fiction" began, as created by Defendants. During opening

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[1] This is made clear since once the judgments were obtained in Dr. Scheller's favor in this case, counsel for Dr. Scheller decided to dismiss the temporary injunction actions and when they did, Defendants once again denied Dr. Scheller billing information and access to the laboratory results, forcing Dr. Scheller to obtain yet another injunction to operate under during the pendency of this appeal.

statement Defendants advised the jury that Dr. Scheller had not sought a position with another hospital since his termination (T390). Plaintiff objected and argued outside the jury's presence that the reason Dr. Scheller had not done so was because he was exercising his staff privileges in this Hospital under the temporary injunctions, and further argued that the jury should be so apprised (T390-91). The trial court overruled the objection but whenever you get ready to bring the testimony up at trial, you had better be careful".

Later in Dr. Scheller's case counsel for Dr. Scheller announced that he was foing to call Donna Sowers, Dr. Scheller's billing clerk, She was going to testify that the Hospital had previously been giving her the billing information but then ceased doing so (T1198). Up to the time the injunctions were entered, there were 744 patients on which the Hospital had refused to give Dr. Scheller billing information (T1198). Counsel for Defendants announced that he intended to ask Donna Sowers if she was presently getting the billing information (T1198). The court ruled that if he did so, then it was only fair to allow Dr. Scheller to inform the jury that he was receiving this information solely as a result of the court orders (T1201). The court asked counsel for Defendants "But for the injunction, would he be getting any [test results and billing information]?", to which counsel for Defendants responded "Well, who knows?" (T1203).

The trial court gave Defendants a choice. If Defendants informed the jury that Dr. Scheller was presently getting billing information and presently had access to the laboratory test results, the Court was going to allow Dr. Scheller to inform the jury of the injunctions (T1204). Counsel for Defendants made the choice to keep all this

information from the jury stating "Well, I won't bring it out then" (T1204).

Donna Sowers testified before the jury that as of April 2, 1980, (the date on which Dr. Scheller's access to the billing information was restored as a result of the temporary injunction) Dr. Scheller had 744 patients of which he was unable to obtain billing information from the Hospital (T1213). As far as the jury knew, Dr. Scheller never received this billing information or any future billing information from the Hospital, and consequently suffered the monetary loss of revenue from the bills that otherwise would have issued.

During Dr. Scheller's case, he was prevented from explaining to the jury that the injunctions had been entered, what had happened to him *after* the injunctions had been entered, and what damages he had sustained thereafter. The jury was informed of what had happened to Dr. Scheller up to April 2, 1980 (the date of the first injunction) but not thereafter. But this was Defendants' doing, not Plaintiff's. Plaintiff was allowed to put on evidence that during the first eight months of 1979, until Dr. Scheller was terminated, he made $251,115 (R2632). From the date of termination, September 1, 1979 to April 2, 1980, the date of the first injunction, Dr. Scheller had only earned $18,000 to $20,000 and the jury was so advised (T1313). Dr. Scheller was *prevented* from adducing evidence as to what occurred thereafter (T1707-1710, 2401-2403,4155). As stated, *supra*, because of this the jury was led to believe that Dr. Scheller was still being denied access to the laboratory and was still being denied billing information, thus totally preventing him from operating as a member of the medical staff. *This was a fiction created by Defendants and this was the basis upon which the lawsuit was tried, at*

Defendants' insistence.

The reason Defendants wanted to try the case based upon this fiction is obvious. They did not want the jury to know that the court had twice enjoined them from violating Dr. Scheller's staff privileges. By creating the fiction, the Defendants lead the jury to conclude that Dr. Scheller's inability to practice pathology at the hospital continued and that his relationships with the designating physicians were totally and continuously broken. By creating the fiction Defendants also allowed Dr. Scheller's compensatory damages to appear inflated (he was denied test results and billing information from April 2, 1980 on, and would be denied that in the future) in hopes of keeping the prospect of a punitive damage award at a minimum (by keeping the jury from knowing of the injunctions.)

During his case, Dr. Scheller proffered the November 1, 1979 injunction prohibiting Defendants from refusing Dr. Scheller access to the laboratory and the March 1980 injunction prohibiting Defendants from refusing to give Dr. Scheller billing information (T1707-1710).

When Dr. Scheller rested his case, the above was all that he was allowed to present in regard to the breach of his relationships and to the damages resulting from Defendants tortious interference with his business relationship with the other doctors and his patients. During Defendants' case, counsel for Dr. Scheller again attempted to have the court advise the jury as to the true facts in this case by arguing that Defendants had opened the door and therefore evidence of the injuntions, and Dr. Scheller's present status, were admissible (T238 - 2384(. The argument was rejected.

During examination of Dr. Scheller in Defendants' case, Defendants began to question him regarding the amount of money he had lost since the time his contract was terminated to the date of trial (T2401). Counsel for Plaintiff objected arguing "I thought it was clearly understood it wouldn't go to the present: April 2, would be the cut off date" (T2401). Counsel for Dr. Scheller argued that he had not presented evidence beyond April 2, 1980 *because of the court's ruling:* "I haven't talked about it. We cut everything off at April the 2nd. I would love to get the injunctions in" (T2402). The court ruled that Defendants could talk about Dr. Scheller's income up until April 2, 1980, and any future loss after trial, but they could not question Dr. Scheller on what had occurred from April 2, 1980 until the time of trial (T2402). Again, this was the result of Defendants keeping the injunctions and their effect, and Dr. Scheller's present status in the hospital, out of evidence.

Later during Defendants' case, the Hospital Administsrator, Bruce, was questioned by Defendants in regard to whether he had ever limited Dr. Scheller's rights in the pathology laboratory (T3111). Counsel for Dr. Scheller objected because, of course, Dr. Scheller was working in the laboratory solely as a result of the injunctions (T3111-12). The trial court informed the jury (T3113-14):

> THE COURT: Okay. Members of the jury, the reason we're doing all this, we have agreed before Court that there would be certain times placed on Dr. Scheller's performance in the laboratory as per the agreement of the hospital, so one of those cut-off times was April 2nd and so most of these questions have to be pertaining to what happened before April the 2nd, '79, was it?

MR. MONTGOMERY: Yes, sir, and October.

MR. BRATTEN: October 1st, 1979 to April 2nd, 1980.

THE COURT: That's why we were trying to stay within the framework of those dates, and Mr. Bratten's questions go to that period of time.

Q. Do you understand all of my questions and all the questions I'm about to ask do you deal with that time period and that time period only, okay?

A. That's correct. I understand that.

After keeping out evidence of anything that had happened after April 2, 1980, Defendants read a portion of Dr. Scheller's deposition to the effect that Dr. Scheller had not made application to other hospitals since his termination (T3130). Counsel for Defendants once again argued that Defendants had clearly opened the door for introduction of the in junctions (T3130-31). The reason Dr. Scheller had not looked elsewhere was because he was being permitted to exercise his staff privileges at the Hospital under the temporary injunctions (R3132). The court pointed out to defense counsel that Dr. Scheller could only explain why he had not applied to another hospital by informing the jury that he was still working at this Hospital under the injunctions, which the court had forbidden him to mention (T3132). The Court reprimanded defense counsel "You should not have read that" (T3183) and further stated:

THE COURT: And we've tried for the last three weeks to stay away from anything that would smack of the injunctive relief.

MR. CLARKE: Judge --

THE COURT: Now that you've brought it up, I've got to agree with them that the jury can only think that he doesn't have a job, doesn't intend to get one and just wants them to give him a free ride (T1316).

...

THE COURT: Mr. Clarke, what you have done is prejudicial to them. I have concluded that. The only thing now is to see how we can rectify it without losing the whole three weeks that we've put in here (T3137)....

THE COURT: Well, what we need now is a solution for the problem that has been created.

MR. MONTGOMERY: I move to introduce the injunctions. That's the solution to the problem. That should've, in my opinion, if the Court please, in rebuttal to this particular statement that was made -- That testimony should never -- We have been so careful and the injunctions have been marked and they're marked for identification. They should be introduced into evidence (T3139)....

THE COURT: All right, gentlemen. What I propose to do is to read lines 1 through 9 to the jury and ask them to ignore those questions and answers and, subsequently, explain to them that Dr. Scheller is presently working for Palm Beach Gardens Hospital and that his working conditions are almost the same as they always were. However this relationship is on a temporary basis, and the Court -- I will subsequently decide whether or not the hospital will have to continue to allow him the use of the clinical facilities and the authority to bill his designated patients for his services.

And I will not allow the plaintiff to reply any further than that (T31339-3140)....Emphasis added

THE COURT: The only question now is how we can do it so as to save the trial, so that at the same token not to have to come back on an appeal; and I think that any mention of a temporary injunctive relief granted just entirely out of order (T3141-42)....

Counsel for Defendants advised the court that they had no objection to the Court instructing the jury along the lines the Court had advised (T3143). Counsel for Dr. Scheller once again suggested that the way to solve the problem was to advise the jury of the injunctions but the court denied the motion (R3144).

The Court advised the jury to ignore the deposition testimony read in regard to Dr. Scheller not applying with other hospitals and further told the jury (T3147):

As you know, a lot of things we have tried to keep from you because we didn't think that they were proper in this case; and I just want to explain to you, to assist you in ignoring these questions and answers, that Dr. Scheller is presently still working at the Palm Beach Gardens Hospital. His working conditions are almost the same as they were. However, this relationship is on a temporary basis and is still before this Court; and I will subsequently decide whether or not the hospital will have to allow him to continue on a permanent basis of using the clinical facilities and having the authority to bill those patients designated for his services. I have

not decided that yet; and, therefore, he is still working at the hospital. And that is something that we have tried to avoid your knowing.

And that is the basis of the reasons for my explaining to you why you should ignore the answers that he said he does not intend to look for another job, because it is still before the Court for my final determination. Okay?

While this explanation was given the jury, Plaintiff's case had long been over. Plaintiff could put on no more evidence regarding Dr. Scheller's advantageous business relationships, his present status at the Hospital or his damages. The Court had clearly ruled "I will not allow Plaintiff to reply any further than that (T3139-40). Dr. Scheller was always confined to demonstrating to the jury only what had occurred up until April 2, 1980. This left the jury with no reasonable alternative but to conclude that the relationships between Dr. Scheller and the designating physicians no longer existed.

If the conclusions of the Court are unchanged, the consequence is to penalize Dr. Scheller for having failed to prove that which he fought vigorously to be permitted to prove but was not allowed. If the conclusions of the Court are unchanged, the Court will have ignored the fiction the Defendants created over Dr. Scheller's repeated objections and thus the Defendants will have successfully taken advantage of their own wrong.

ARGUMENT AS TO COUNT III

In this Court's decision, the Court agrees with the Defendants' position that the injunctions were not admissible (p.11). The Court comments that "the jury was not

advised of the injunctions, but appellee has placed heavy reliance on the injunctions in argument before this Court" (p.10). Dr. Scheller was not relying upon the injunctions. Dr. Scheller was pointing out the consequences of Defendant's conduct in keeping the injunctions, and anything occurring beyond April 2, 1980, out of evidence, over Dr. Scheller's strenuous and repeated objections. The consequences were that the jury was allowed to believe that the Hospital had continued to prevent Dr. Scheller from practicing pathology at the Hospital even up to trial and would and could do so in the future. As far as the jury knew, Dr. Scheller was still on the Medical Staff but his rights and privileges were being denied him by the Hospital and would be denied him in the future, except for the court's rather vague explanation of some sort of temporary measures taken by the court. The jury was led to believe that the Hospital had refused to give Dr. Scheller billing information for 744 patients as early as April 1980 and had continued to refuse to do so since that time, and would do so in the future, with Dr. Scheller's only recourse through this court action. Once again, this is the way Defendants chose to try this lawsuit. Defendants should be made to live with this trial tactic, the adverse result of which should be visited upon them and not Dr. Scheller.

At page 10 of the Court's opinion, the question is raised as to how Dr.Scheller can get damages for future interference when that very interference has been twice enjoined. The answer is that ordinarily Dr. Scheller would only have been entitled to be compensated for the damage which occurred before the injunctions were issued. However, the Defendants chose to manufacture false evidence by their objections -- the fiction that the injunctions were not issued and that Dr. Scheller's losses would continue into the future. This was clearly a calculated

tactic by the Defendants intended to conceal their callous and arrogant disregard of the law. They chose elevated compensatory damages to avoid elevated punitive damages. The present opinion shifts the consequences of this transgression by the Defendants to Dr. Scheller instead of permitting the Defendants to reap what they themselves have sown.

The jury accepted the Defendants' fiction and properly awarded both past and future damages. Under the evidence which the jury actually heard, the jury correctly found that Dr.Scheller's advantageous business relationships had been tortiously destroyed and that his compensatory damages were 1.25 million dollars. Because of the "fiction" created by Defendants, the jury was led to believe that Dr. Scheller was being, and would be in the future, denied his staff privileges by the Defendants (which tortiously interfered with his advantageous business relationship with his referring doctors and his patients). The jury took this into consideration in determining compensatory damages.

This Court's decision focused on whether there was proof of future damages as to Count III, totally ignoring past damages. That this is true is demonstsrated by this Court's statement at page 10 that "no one has raised the question of how Dr. Scheller can get damages for future interference..." This case concerned not only *future* interference but past interference.

There clearly was proof of *past damages* resulting from the tortious interference, even if we forget about future damages. Defendants conceded they denied Dr. Scheller billing information (T1921). By April 2, 1980 the Hospital had withheld billing information on 744 patients.

And, again this was conceded by Defendants (T1925). In regard to the resulting damages, Defendants did not argue that Dr.Scheller had not sustained any damages, only that Dr.Scheller "didn't go one step forward. He didn't say 'As a result of that' -- not receiving those 700 bills -- 'I have lost "x" amount of dollars'" (T1928). If there was any damage, even without proof of the exact amount of damage, it would support an award of nominal damages, which in turn would support the punitive damages awarded in this case. Counsel for Defendants even admitted at trial that a nominal damage award would be warranted.

Dr. Scheller also proved past damages by proving that Defendants had refused to allow him access to the test results for a period of time (until enjoined not to do so). If Defendants refused to allow Dr. Scheller to review even one test result they tortiously interfered with his business relationship with another physician and he was damaged. The fact that Plaintiff did not prove the value of the damage is irrelevant. Again, Dr. Scheller was at least entitled to nominal damages, which in turn would support the punitive damages awarded.

The previously quoted holding at page 11 of the Court's decision is not only factually wrong but it is based upon a false legal premise. Again, the Court stated:

> The evidence was that no doctor breached his relationship with the plaintiff....In the context of this case, the fact that no doctor *breached* the existing relationship with Dr. Scheller was of crucial significance. Since the relationship between Dr. Scheller and the 63 designating physicians remained intact, there was no cause of action proved and the court should also have

directed a verdict on Count III.

The court's statement is directly contrary to Florida law. There does not have to be proof that any physician *breached* his business relationship with Dr. Scheller as a requisite to a cause of action for tortious interference. It is sufficient if one of the parties (i.e.), Dr. Scheller, was coerced into abandoning the relationship with the other physicians and his patients. Part of Dr. Scheller's business relationship was the ability to properly bill for his services and to obtain the necessary laboratory data for review on his patients. Dr.Scheller was required to abandon his relationship with the other physicians and with his patients for the period of time that he was in fact prevented access to the lab and prevented from obtaining billing information. That was established.

Until the issuance of the two injunctions prior to trial, there is no question that Dr.Scheller was compelled to abandon his position as pathologist for the staff physicians that had so designated him. The law is as set forth in WEST v. TROELSTRUP, 367 So.2d 253 (Fla. 1st DCA 1979) that there must merely be evidence of coercing "*one* of the parties to the relationship to abandon the relationship". Clearly for some period of time, *at leasts until the injunctions were entered,* Dr. Scheller was coerced into abandoning his relationship with the other physicians and his patients.

The Restatement of Torts 2d makes it clear that the abandonment requirement is satisfied by Dr.Scheller's inability to perform his contractual relationship with the other physicians and his patients. §766A pertains to intentional interference resulting in abandonment by Dr. Scheller:

> One who intentionally and improperly interferes with the performance of a contract....between another and a third person, by preventing the other from performing the contract *or causing his performance to be more expensive or burdensome,* is subject to liability to the other for the pecuniary loss resulting to him. (Emphasis added).

This Court refers on page 11 of its decision to Defendants' argument that their denial of access to the lab and denial of billing information was not tortious interference but was a "mere inconvenience". As Section 766A, *supra,* provides, *Dr. Scheller was not even required to show that other physicians or patients abandoned their relationship with him.* All he was required to show was that Defendants' interference caused his performance to be more expensive or burdensome. He clearly demonstrated this.

Even if the law recognized a distinction between "mere inconvenience" and "tortious interference", such a distinction would certainly be a factual issue for determination by the jury. Clearly in this case, that factual determination was properly made in favor of Dr.Scheller.

First, Dr. Scheller proved that Defendants *admittedly* denied Dr. Scheller the right to review and interpret laboratory test results (T4579). Defendants claimed that the laboratory had a master log where all tests were logged in and that Dr. Scheller could have obtained the results from the log. The log book did not list the designating physicians' name so Dr. Scheller would not even know which tests related to his patients. Moreover, checking the log books would be a virtual impossibility. Thousands of

tests were being performed daily in the laboratory. To withhold the test results from Dr. Scheller and make him search through thousands of log entries was without question more burdensome and expensive.

Defendants' denial of the billing information to Dr. Scheller was also shown to be more burdensome and expensive to Dr. Scheller. Defendants argued to the jury that Dr. Scheller could have obtained the billing information from the patient's charts or the lab logs. The evidence showed that it was impossible for Dr. Scheller to bill from the patient' charts which were located at the patient' rooms on each floor. Most of Dr. Scheller's time would be spent in running down charts. The laboratory logs were also not sufficient for billing. The lab logs did not indicate who the patient's physician was. Therefore, Dr. Scheller would not know which of the tests in the log books related to his patients. Since thousands of tests were being performed in the laboratory every day, Dr. Scheller would be required to go through the thousands of test results set forth in the logs, which would literally take hours and entail having to hire a number of employees to do nothing but check log books.

This Court's decision not only directly conflicts with the above case law, but is based upon a new fiction founded upon the Court's knowledge of the injunctions -- knowledge kept from the jury by the Defendants. The Court is trying on appeal a totally different case than was tried to the jury. The Court has held that Dr. Scheller cannot recover since the injunctions allowed him to continue on the medical staff. The jury never knew this because Defendants kept the injunctions out of evidence. The jury was allowed to believe that Defendants had continued to deny Dr. Scheller billing information and access to test results up until the

time of trial, except for some unexplained temporary measure the court had taken, and would and could do so in the future. Accordingly, the jury was correct in determining that there was in fact tortious interference and that the compensatory damages resulting therefrom were 1.25 million dollars. This Court was incorrect in considering the injunctions in deciding the case, when the jury was never informed of the injunctions because of the Defendants' actions.

COUNT I - BREACH OF CONTRACT

The judgment in favor of Dr. Scheller on Count I of the complaint was reversed because this Court found: 1) there was no ambiguity in Dr. Scheller's employment contract; 2) If an ambiguity existed, it had to be resolved against Dr. Scheller as a matter of law and; 3) the contract was void for lack of mutuality.

The jury's factual findings in this case were:

> (a) At the time PALM BEACH GARDENS COMMUNITY HOSPITAL, INC., entered into the contract with Fred Hobin, the Medical Staff Bylaws contained this provision: "Any physician holding a contract with the Hospital must be a member of the active Medical Staff?"
> YES___X___ NO_____
> ******
>
> (c) Was it the intent of the Hospital and the Medical Staff at the time the Bylaws were adopted that this provision meant that the Hospital could not contract with a physician until that physician had been a member of the Medical

Staff for at least two years and had been elevated to Active Staff membership?
YES___X___ NO_____

******

(e) Did the Hospital violate this provision of the contract by entering into a contract with Fred Hobin who was not a "member of the active Medical Staff?"
YES___X___ NO_____

Clearly, the Medical Staff Bylaws constituted a contract between Dr. Scheller and the Hospital. (See PALM BEACH MARTIN COUNTY MEDICAL CENTER v. PANARO, 431 So.2d 1023 (Fla. 4th DCA 1983) where the Court, through Judge Glickstein's opinion, affirmed the trial court's finding that the Bylaws constituted a separate contract between the doctor and the hospital.) It then must be queried whether any ambiguity between the above provision of the Bylaws requiring the Hospital to contract only with a physician on the Active Staff and the 90 day provision in Dr. Scheller's contract must be resolved against Dr. Scheller as a matter of law; and whether there is a lack of mutuality.

This Court's conclusion that any ambiguity must be resolved against Dr. Scheller as a matter of law can only result from viewing the separate documents totally in the abstract. But they were not entered into in the abstsract. This Court has read Dr. Scheller's appellate brief and is aware of the atmosphere existing in the Hospital between the doctors and the Defendants. This Court is aware that there was testimony presented that the physicians, who were working for the first time with an unknown (i.e.), a

for-profit hospital run by an international conglomerate, wanted to insure their own control of the pathology laboratory in the Hospital and its workings. The evidence was that Defendants were willing to make concessions in this regard in order to attract these physicians onto its staff. The many days of testimony indicated that there were limitations placed on the hiring and replacement of not only Dr. Scheller, but any contract physician employed by the Hospital. Those limitations were not at all absurd, but were a product of what was going on in this particular hospital at this particular time. The Court has totally ignored this evidence.

Basic hornbook law provides that the meaning of contract terms is to be judged by the situation in which the parties were placed at the time of making their agreement. MOTOR VEHICLE GAS CO. v. ATLANTIC NAT. INS. CO., 374 F.2d 601 (CA Fla 1967); contract terms must be interpreted in view of the surrounding circumstances, the objects to be obtained, and the apparent purpose which the parties sought to accomplish to arrive at the parties' intention. HOLMES v. KILGORE, 103 So. 825 (Fla. 1925); FLORIDA POWER CORP. v. CITY OF TALLAHASSEE, 18 So.2d 671 (Fla. 1944); UNDERWOOD v. UNDERWOOD, 64 So.2d 281 (Fla. 1953). This Court has ignored this basic law, and in doing so has determined that Dr. Scheller's interpretation of the Bylaw provision and the 90 day provision in his contract is absurd. It is *NOT* absurd in the context of what was going on in this Hospital. The jury clearly did not find it absurd and they heard all the testimony regarding the atmosphere out of which Dr. Scheller's employment contract, and the acceptance of the Medical Staff Bylaws, arose. For this court to now label as absurd the fact that the Hospital was limited to hiring and replacing contract physicians from those on

the Active Medical Staff, which was unequivocally supported by the evidence at trial as to the intent of the parties, totally ignores the facts and circumstances of this case. This Court has simply chosen to disbelieve Dr. Scheller's evidence.

This Court refers to the fact that Dr. Scheller claimed that reading his employment contract and the Bylaws together conferred upon him a lifetime benefit. That was not Dr. Scheller's argument. His argument was that he had a contract for anywhere from 2 years to lifetime. How long was for the jury, not this Court, to decide.

This Court's incorrect statement that Dr.Scheller claimed a lifetime contract leads this Court to the incorrect conclusion that there is an "appalling" lack of mutuality. While mutuality of obligation is essential to a contract, mutuality of remedy is not. BACON v. KARR, 139 So.2d 166 (Fla. 2d DCA 1962). Mutuality of obligation must be present in order to form the contract. MERLITE LAND, SEA AND SKY, INC. v. PALM BEACH INC. PROPERTIES, INC., 426 F.2d 495 (CA Fla. 1970). In the present case, there is no question that mutuality of obligation existed. Dr. Scheller agreed to run the pathology laboratory and the Hospital agreed to the payment terms. Mutuality of remedy is entirely different. The legal principle requiring mutuality in contracts does *not* require that in every case each party have the same remedy for breach of the other party. BOSSEERT v. PALM BEACH COUNTY COMPREHENSIVE COMMUNITY MENTAL HEALTH CENTER, INC., 404 So.2d 1138 (Fla. DCA 1981): SOUTHERN CRANE RENTAL, INC. v. CITY OF GAINESVILLE, 429 So.2d 771 (Fla. 1st DCA 1983). The means of enforcement may differ without affecting the reciprocal obligations. BACON v. KARR.

COUNT II - TORTIOUS INTERFERENCE WITH CONTRACT

This Court states at page 8 of its decision that Dr. Scheller cannot recover for tortious interference with contract because there was no breach of contract. In other words since the contract with the Hospital was terminable with 90 days notice, there could be no interference with that contract. *That is not the law in the state of Florida.* Case law in Florida clearly provides that even if a contract is terminable at will, if a third party improperly convinces a party to the contract to terminate the contract, he can be sued for tortious interference with the contract. UNISTAR CORP. v. CHILD, 415 So.2d 733 (Fla. 3d DCA 1982). For example, if the plaintiff is employed under a contract at will and a third party, without cause, convinces the employer to fire the plaintiff, he is liable for tortious interference with the contract. It is irrelevant that the contract was terminable at will, or here with 90 days notice. It is not only unnecessary for there to be a *breach* of contract to support a tortious interference claim, there need not even be a contract to begin with. Interference with an advantageous business relationship, even in the absence of a contract, is sufficient to sustain a claim for damages under Florida law. SCUSSEL v. BOLTER, 386 So.2d 1227 (Fla. 3d DCA 1980). Therefore, this Court's decision regarding Count II absolutely conflicts with clearly established Florida case law.

MISSTATEMENTS IN THE OPINION

Throughout its decision this Court refers to Dr. Scheller as presently being "employed" as a member of the medical staff (p.3). He is not "employed" by anyone. And as far as the jury knew he was a member of the staff in

name only because he was being prevented from practicing pathology in the Hospital by Defendants at the time of trial, and would be in the future.

Dr. Hobin was never "employed" earlier by the Hospital" as this Court states at page 2. Dr. Hobin had been previously employed by Damon Corporation who had a contract with the Hospital.

On page 14, footnote 2 this Court states that the Bylaws allowed a staff doctor to designate an "outside specialist in pathology". No one took this position. The Bylaws allowed the staff doctors to designate another pathologist on the medical staff, not an outside pathologist.

CONCLUSION

The Seventh Amendment to the Bill of Rights of the United States Constitution provides:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved and no fact tried by a jury shall be otherwise re-examined in any court of the United States, according to the rules of the common law

In the present case, the Court has violated Dr. Scheller's Seventh Amendment rights by retrying this case. The jury made detailed factual findings and monetary awards which, when reviewed in light of the evidence that was presented to them and in light of the evidence that was not presented to them because Defendants kept the evidence from them, the jury verdict is fully supported, both legally and factually.

WHEREFORE, Appellee requests this Court to grant a rehearing in this cause for the above-stated reasons.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been mailed to: MARK HICKS, 1414 Alfred I. duPont Bldg., Miama, FL 33131; MERCER K. CLARKE, 1301 Alfred I. duPont Bldg., 169 E. Flagler Drive, Miami, FL 33131; LARRY KLEIN, 501 So. Flagler Drive, West Palm Beach, FL 33401; this 10th day of AUGUST, 1984.

MONTGOMERY, LYTAL, REITER,
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BY /s/ Edna L. Caruso
EDNA L. CARUSO

APPENDIX D

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

FOURTH DISTRICT

CASE NO: 80-1650

AMERICAN MEDICAL INTERNATIONAL, INC., et al.,

Appellants,

v.

ZBIGNIEW SCHELLER,

Appellee.

EN BANC
MOTION TO VACATE COURT'S DECISION AND TO TRANSFER
CASE TO ANOTHER DISTRICT COURT FOR RESOLUTION

Appellee, SCHELLER, files this En Banc Motion to Vacate the Court's decision rendered in this case and Motion to Transfer this case to another District Court for resolution and as grounds therefor would show:

The decision in this case was rendered with Judge Beranek as its author. The decision was rendered on the last day of Judge Beranek's tenure in office. Subsequent to his leaving the Fourth District, it was learned by

Dr. Scheller and his counsel that Judge Beranek intended to go into the practice of law with one of the lawyers representing the Appellants/Defendants in this case, Larry Klein. Upon recently learning this information, Dr. Scheller's counsel contacted John Beranek in Tallahassee to discuss the matter because Dr. Scheller was extremely upset that a judge would continue to sit on, and render a decision in, a case involving an attorney with whom he was discussing future employment. John Beranek suggested to counsel for Plaintiff that an alternative available, in order to avoid any appearance of impropriety, was for him to contact the Fourth District or write a letter to the Fourth District suggesting that in his opinion a rehearing should be granted in this case.

Thereafter, John Beranek contacted counsel for Appellants/Defendants regarding this matter. After talking with counsel for Appelants, John Beranek contacted counsel for Dr. Scheller back and advised that he had changed his mind, and that he had been dissuaded from taking any action.

Dr. Scheller's position is that there is an appearance of impropriety in former Judge Beranek's having rendered a decision in a case where counsel for one of the parties is an attorney with whom John Beranek was discussing future employment while sitting on the case; and with whom John Beranek has now announced he intends to practice law.[1] Counsel for Dr. Scheller have been advised, and

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[1] The Montgomery law firm has recently hired Judge Kapner who ruled on a Motion for Summary Judgment in one of their cases during the period he was discussing potential employment with their law firm. The Montgomery law firm has agreed to allow that Order to be set aside and have another judge rule on the Motion, in order to avoid any appearance of impropriety.

have confirmed, that Judge Beranek did in fact recuse himself from any cases on which he was sitting involving John Moyle's firm, because he was discussing employment with that law firm. He did not, however, recuse himself from sitting on Larry Klein's cases even though he was discussing the possibility of employment with Larry Klein.

Dr. Scheller acknowledges that he has been advised by his attorneys that they feel that there has in fact been no impropriety, although they, like him, feel that an appearance of impropriety does exist. But, the issue is one of the appearance of impropriety. This case involved a $7,250,000 verdict which this Court, with Judge Beranek as its author, not only reversed, but entered judgment for the Defendants on all counts. [2]Dr. Scheller feels that the Court's decision authored by Judge Beranek is gravely wrong and has filed a lengthy Motion for Rehearing that is pending before this Court. However, it is Dr. Scheller's position that Judge Beranek should never have written the decision rendered in this case and therefore the decision should be vacated. John Beranek should have recused himself in this case. John Beranek recused himself in cases involving other law firms with whom he was discussing employment, and yet did not recuse himself in this case, when he was discussing employment with Larry Klein.

Dr. Scheller feels that the appearance of impropriety is acknowledged by the fact that Larry Klein has recently filed a Notice of Withdrawal of counsel in this case.

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[2]The decision was a 2 to 1 decision, Associate Judge Smith dissented.

ARGUMENT

In DICKINSON V. PARKS, 140 So. 459 (Fla. 1932) the Florida Supreme Court stated:

> ...It is a matter of no concern what judge presides in a particular cause, but it is a matter of grave concern that justice be administered with dispatch, without fear or favor or the suspicion of such attributes. The outstanding big factor in every lawsuit is the truth of the controversy. Judges, counsel, and rules of procedure are secondary factors designed by the law as instrumentalities to work out and arrive at the truth of the controversy.
>
> The judiciary cannot be too circumspect, neither should it be reluctant to retire from a cause under circumstances that would shake the confidence of litigants in a fair and impartial adjudication of the issues raised.

And in Stater ex rel MICKLE v. ROWE, 131 So. 331 (Fla. 1930), the Florida Supreme Court held;

> Every litigant, including the State in criminal cases, is entitled to nothing less than the cold neutrality of an impartial judge. It is the duty of courts to scrupulously guard this right of the litigant and to refrain from attempting to exercise jurisdiction in any matter where his qualification to do so is seriously brought in question. The exercise of any other policy tends to discredit and place the judiciary in a compromising attitude which is bad for the administration of justice.

In Florida, there are four separate expressions concerning the disqualification of trial judges, which are set forth in : (1) The Code of Judicial Conduct Canon 3-C; (2) section 38.10, Florida Statutes (1981): (3) Florida Rule of Criminal Procedure 3.230, which was adopted verbatim by this Court from a former statute, section 911.11, Florida Statutes (1967): and (4) Florida Rule of Civil Procedure 1.432.

The Code of Judicial Conduct sets forth basic principles of how judges should conduct themselves in carrying out their judicial duties. Canon 3-C(1) states that "[a] judge should disqualify himself in a proceeding in which his impartiality might reasonable be questioned...." This is consistent with the case law of the Florida Supreme Court, which holds that a party seeking to disqualify a judge need only show "a well grounded fear that he will not receive a fair trial at the hands of the judge. It is not a question of how the judge feels; it is a question of what feeling resides in the affiant's mind and the basis for such feeling." STATE ex rel BROWN v. DEWELL, 179 So. 695 (Fla. 1938). See also HAYSLIP v. DOUGLAS, 400 So. 2d 553 (Fla. 4th DCA 1981). The question of disqualification focuses on those matters from which a litigant may reasonably question a judge's impartiality rather than the judge's perception of his ability to act fairly and impartially.

The Florida Supreme Court has held that:

> ...What is important is the party's reasonable belief concerning his or her ability to obtain a fair trial. A determination must be made as to whether the facts alleged would place a reasonable prudent person in fear of not receiving

> a fair and impartial trial. [hearing before appellate court]. Livingston v. State, 8 FLW. 420 (Fla. 1983)

It is submitted that based upon the above, Dr. Scheller has a reasonable and well-founded belief that Judge Beranek should have recused himself from sitting on this case. For that reason, the Court's decision should be vacated.

Dr. Scheller asks this Court not only to vacate this Court's decision, but to transfer the case to another appellate court for resolution. Dr. Scheller has a fear that even if this Court vacates Judge Beranek's decision, and rehears this case, the Court may subconsciously feel reluctance in reversing former Judge Beranek's decision, fearing that a reversal could be seen by others as a suggestion that Judge Beranek in fact acted improperly. For everyone's benefit, -- the parties, the Court, former Judge Beranek -- the decision in this case should be vacated and the case should be transferred to another District Court for resolution.

Wherefore, Dr. Scheller requests this Court to vacate the decision entered in this case and transfer the case to another District Court for final resolution.

I HEREBY CERTIFY that a copy of the foregoing has been mailed to: MARK HICKS, 1414 Alfred I. duPont Bldg., Miami, FL 33131; and to MERCER K. CLARKE, 1301 Alfred I. du Pont Bldg., Miami, FL 33131, this 20th day of SEPTEMBER, 1984.

MONTGOMERY, LYTAL, REITER,
DENNEY & SEARCY, P.A.
P. O. Drawer 3626
West Palm Beach, Fl 33402
and
EDNA L. CARUSO, P.A.
Suite 4B-Barristers Bldg.
1615 Forum Place
West Palm Beach, FL 33401
305-686-8010
Attorneys for Appellee

BY /s/ Edna L Caruso
EDNA L. CARUSO

APPENDIX E

A F F I D A V I T

COUNTY OF PALM BEACH)
STATE OF FLORIDA)

1, ZBIGNIEW SCHELLER, who after being duly sworn, deposes and states:

I am the Appellee in Case No. 80-1650 now pending in the appellate court. The Appellants appealed a 7.25 million dollar verdict in my favor. One of the Appellants' attorneys was Larry Klein. Mr. Klein's name appeared on Appellants' briefs and he appeared at oral argument and sat at counsel's table for Appellants.

At some point I was advised that Judge Beranek was leaving the bench on July 15, 1984. On Friday, July 13, 1984, a decision, authored by Judge Beranek, was rendered by this Court, which reversed the 7.25 million dollar award in my favor and directed that judgment be entered for Appellants/ Defendants. My Motion for Rehearing is now pending before this Court.

Subsequent to my filing the Motion for Rehearing, I was advised that Larry Klein filed a Motion to Withdraw as counsel in the appeal. I was also advised that John Beranek, upon leaving the bench, had recently announced that he was going into practice with Larry Klein. Upon learning this information, I was extremely upset and spoke with my attorneys about this matter at length. They explained to me that while I might find no comfort in their telling me that they felt sure there was no actual impropriety involved, they did agree with me that certainly the

circumstances involved had the appearance of impropriety. For these reasons, my attorney contacted John Beranek in Tallahassee, Florida, to inquire into these matters. John Beranek suggested to my attorneys that an alternatiive, in order to avoid an appearance of impropriety, would be for him to either contact the court, or write a letter to the court, and suggest that my Motion for Rehearing be granted. John Beranek advised my attorneys that he would contact Appellants' counsel in this regard. John Beranek subsequently advised my attorneys that he had been dissuaded by Appellants' attorneys from taking this action.

I am now advised that John Beranek did in fact recuse himself from any cases involving John Moyle's law firm because he was discussing future employment with that firm. John Beranek did not recuse himself from sitting on and deciding Larry Klein's cases, even though he was discussing future employment with him.

FURTHER AFFIANT SAYETH NOT.

Dated this 20th day of SEPTEMBER, 1984.

West Palm Beach, Florida

/s/

ZBIGNIEW SCHELLER

SWORN TO and SUBSCRIBED before me this 24th day of SEPTEMBER, 1984.

/s/

NOTARY PUBLIC, STATE OF
FLORIDA AT LARGE.

MY COMMISSION EXPIRES: JAN. 31, 1985 (SEAL)

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

CASE NO. 80-1650

AMERICAN MEDICAL INTERNATIONAL, INC., et al.,

Appellants,

v.

ZBIGNIEW SCHELLER,

Appellee.

NOTICE OF FILING

Appellee, ZBIGNIEW SCHELLER, files the attached Affidavit of Robert M. Montgomery, Jr., in support of its En Banc Motion to Vacate Court's Decision and to Transfer Case to Another District Court for Resolution.

I HEREBY CERTIFY that a copy of the foregoing has been mailed to: MARK HICKS, 1414 Alfred I. duPont Bldg., Miami, FL 33131; and to MERCER K. CLARKE, 1301 Alfred I. duPont Bldg., Miami, FL 33131, this 15 day of October, 1984.

MONTGOMERY, LYTAL, REITER, DENNEY & SEARCY, P.A.
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Attorneys for Appellee

by /s/ Edna Caruso
EDNA L. CARUSO

**IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT**

CASE NO.: 80-1650

AMERICAN MEDICAL INTERNATIONAL, INC., et al,

Appellants,

v.

ZBIGNIEW SCHELLER,

Appellee.

AFFIDAVIT OF ROBERT M. MONTGOMERY, JR.

STATE OF FLORIDA)

COUNTY OF PALM BEACH)

Before me, the undersigned authority, personally appeared ROBERT M. MONTGOMERY,JR., who being first duly sworn, deposes and says:

1. The opinion reversing the case of Scheller v. American Medical International Inc., et al, Case No. 80-5519 CA (L) 01-F, came fourteen months after oral argument and was rendered on the day that John Beranek left the Appellate Bench.

2. A few days subsequent to August 23, 1984, I was told by Edna L. Caruso, Attorney at Law, counsel for the Appellee, that Larry Klein, Esq., co-counsel for the Appellants, had filed a motion to withdraw, on the grounds that as of August 15, 1984, the former appellate Judge, John Beranek, had accepted a position with Mr. Klein's firm.

3. I immediately contacted my client, Zbigniew Scheller, M.D., and advised him of this circumstance. Because Dr. Scheller became upset about the seeming impropriety of such an incident, and being unable to assuage the anxieties of my client, I contacted John Beranek in Tallahasse, Florida.

4. Upon contacting Mr. Beranek in Tallahassee, Florida, and stating my client's fears to him about the appearance of impropriety, Mr. Beranek advised me that he thought that a re-hearing might well be in order and suggested that he was willing to call the Chief Judge of the Fourth District Court of Appeal or write a letter to the effect that in order to avoid any semblance of impropriety, a re-hearing might be in order.

5. I discussed with Mr. Beranek the fact that he now was simply a lay person and I expressed concern about a lay person contacting the Court regarding a pending case which was on re-hearing, even though he was a former Judge of the Court.

6. After further discussion, Mr. Beranek and I agreed that we would think about the matter and have further discussion about it at a later date. A few days subsequent to that time, I contacted Mr. Beranek in Tallahassee, Florida again and at that time suggested to him that I

believed his actions could well be in order, because as I understsood the case law, it was only the Judge to whom the recusal was directed who had the power to determine whether or not there was an appearance of impropriety. Mr. Beranek advised me that he would contact opposing counsel and would discuss it further with me.

7. In the meantime, I was informed that while Mr. Beranek was sitting as a Judge on the Fourth District Court of Appeal, he recused himself on a case to avoid any semblance of impropriety on the ground that he had had a conversation regarding possible future employment with the law firm of Moyle, Jones & Flanigan, which firm represented one of the parties on a pending appeal.

8. Upon contacting my client, Zbigniew Scheller, M.D., I advised him of this turn of events and as a lay person, he could not possible understand why Mr. Beranek had not recused himself in his case, where Mr. Beranek had not only discussed possible employment, but had actually accepted a position with a firm representing Dr. Scheller's adverseraries on appeal. Dr. Scheller indicated his feeling that it was entirely inappropriate for the Fourth District Court of Appeal to render a decision in this manner. I advised Dr. Scheller that Mr. Beranek had advised me that it was Mr. Beranek who made sure that the decision was completed on Mr. Beranek's last day on the Court; that it was he who went to the Chief Judge to expedite the dissent written by the Honorable Rupert Smith; that it was Mr. Beranek who saw that this case was reversed as one of his last acts while on the Bench. I advised Dr. Scheller that this was what Mr. Beranek told me over the telephone and my client, Dr. Scheller, firmly believes that he was denied his right to a fair and impartial appellate review.

9. I agreed with Dr. Scheller that in my opinion, there was an appearance of impropriety.

10. I subsequently contacted Mr. Beranek and he advised me that after speaking to opposing counsel, he was dissuaded from communicating with the Court regarding the rehearing, and he would not do so. However, he told me that I could indicate in whatever paper filed with the Fourth District the events as they had transpired (as indicated above).

11.My client, Zbigniew Scheller, M.D., has informed me repeatedly of his feeling that his rights as an American citizen to constitutional due process have been invaded and that his verdict by a jury of his peers has been improperly snatched from him. It is apparent from Dr. Scheller's words and demeanor that there is nothing that could persuade him that Mr. Beranek did not have an interest in the outcome of the case.

/s/ Robert M. Montgomery, Jr.

ROBERT M. MONTGOMERY,JR.

Sworn to and subscribed
before me on information
and belief, this 12th day of
October, A.D. 1984.

Notary Public, State of
Florida at Large.
My Commission expires:

NOTARY PUBLIC STATE OF FLORIDA
MY COMMISSION EXPIRES FEB. 1, 1986
BONDED THRU GENERAL INS. UND.

APPENDIX F

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT JANUARY TERM 1985

AMERICAN MEDICAL INTERNATIONAL, INC., PALM BEACH GARDENS COMMUNITY HOSPITAL, INC., and T. R. BRUCE, JR.,

Appellants/
Cross Appellees,

v.

ZBIGNIEW SCHELLER,

Appellee/
Cross Appellant.

CASE NO. 80-1650

Opinion filed January 30, 1985

Appeal and cross appeal from the Circuit Court for Palm Beach County; Edward Rodgers, Judge.

Smathers & Thompson, and Mark Hicks of Daniels and Hicks, P.A., Miami, for Appellants/ cross appellees.

Montgomery, Lytal, Reiter, Denney & Searcy, P.A., and Edna L. Caruso of Edna L. Caruso, P.A., West Palm Beach, for appellee/cross appellant.

PER CURIAM

The petition for rehearing and the en banc motion to vacate court's decision and to transfer case to another district court for resolution are denied. The request for oral argument and to consider en banc motion as regular motion are rendered moot.

DOWNEY and GLICKSTEIN, JJ., concur in the denial of the petition for rehearing.

SMITH, RUPERT JASEN, Associate Judge, dissents from the denial of rehearing.

ANSTEAD, C.J., DOWNEY, HERSEY, GLICKSTSEIN, HURLEY, and DELL, JJ., concur in the denial of en banc motion.

LETTS, J., specially concurs in denial of en banc motion.

WALDEN and BARKETT, JJ., recuse themselves from consideration of en banc motion.

LETTS, J., specially concurring.

There has been no request for rehearing en banc in this case. This being so I am precluded from considering the decision on its merits.

As I view this matter, the question of whether I should vote to disqualify this entire court and as a necessarily included disqualification, myself, is not controlled by any of the cases cited, but rather by *In re Estate of Carlton*, 378 So.2d 1212 (Fla 1979). True, *Carlton* did not involve a fact situation on all fours with the case at bar. However, it stands for the proposition that an appellate judge is not subject to the dictates of Chapter 38 of the Florida Statutes, and that he must, in the exercise of his personal discretion, determine for himself the *legal sufficiency* of the request and the *propriety* of his withdrawing.

I can discover no legal sufficiency for the request, but I do find it would be improper for this court to withdraw because it would "adversely and unjustly affect the successful party in the cause." See *Carlton, supra,* at 1220.

APPENDIX G

IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA
CASE NO: 66,655

ZBIGNIEW SCHELLER,

Petitioner,

v.

AMERICAN MEDICAL INTERNATIONAL, INC., et al.,

Respondents.

AMENDED
BRIEF OF PETITIONER ON JURISDICTION

MONTGOMERY, LYTAL, REITER,
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PREFACE

This is a Petition to Invoke this Court's discretionary jurisdiction based upon conflicting decisions. The parties will be referred to by their proper names. The following symbol will be used:

(A)-Petitioner's Appendix

STATEMENT OF THE CASE AND FACTS

Dr. Scheller was both a member of the Medical Staff of Palm Beach Gardens Hospital, a private "For-profit" hospital, and under contract with the Hospital as the Medical Director of the Hospital's Pathology Laboratory. The contract was ambiguous in that it not only provided that either party had the right to terminate it upon 90 days notice, but also that the Department of Pathology must be operated in accordance with the Medical Staff Bylaws. Dr. Scheller testified that the intent of this provision was to incorporate the Staff Bylaws into his contract. Article II of the Staff Bylaws provided that any physician holding a contract with the Hospital must be a member of the Active Medical Staff. This provision was adopted when AMI, a conglomerate that owns 60 hospitals throughout the world, purchased Palm Beach Gardens Hospital. The existing staff physicians in the Hospital were reluctant to continue on the Staff of this for-profit Hospital unless they were allowed to retain control over matters relating to patient care. They did not want decisions within the Hospital dealing with patient care to be made based upon profit motives. Therefore, it was agreed that the Medical Staff Bylaws would place decisions regarding patient care in the hands of the Medical Staff. One of the provisions that the Medical Staff insisted upon was that a physicial contracting with the Hospital to run a Department must be a member of the Active Medical Staff, which allowed the

Medical Staff the opportunity to observe the physician's competency for two years. If the Staff members determined a physician was unqualified, they could object to his admission to the Medical Staff and therefore his employment as a contract physician. Thus, this provision prevented the Hospital from contracting with incompetents to run their different Departments, such as Pathology, Radiology, etc., upon which the other physicians relied. The Medical Staff Bylaws also provided that the Staff members could designate someone other than the contract physician to do their pathology and radology work, if they so desired.

While Dr. Scheller served as contract physician for the Pathology Laboratory, the Hospital Administrator began attempting to run the Lab through a Lab Supervisor he had hired. The Hospital Administrator and Dr. Scheller had many disputes over the way the Lab was being run because the Hospital failed to purchase equipment needed by the Lab, employees hired by the Hospital were unlicensed and incompetent, resulting in gross errors being made and inaccurate test results, and delays in getting test results. While the Hospital and AMI were cutting the Lab's expenses, production within the Lab increased four to five times, going from billings of $450,000 to 2.5 million dollars.

Dr. Scheller became a thorn in the side of the Hospital and AMI. A letter of termination was sent to Dr. Scheller and a physician who was not a member of the Active Medical Staff was hired to replace him.

Dr. Scheller sued the Hospital for breach of contract, and AMI, the Hospital and the Hospital Administrator for tortious interference with the contract, and tortious interference with an advantageous business relationship

Even though Dr. Scheller had been fired as a contract physician, he was still a member of the Medical Staff and as such was entitled to be appointed the pathologist for any of the Staff members if they chose to use him instead of the Hospital's contract physician. As a Staff member, he was also entitled to full use of the Hospital facilities. During the pendency of this lawsuit, however, the Hospital and AMI refused to allow Dr. Scheller to review and interpret test results performed on patients of doctors who had designated him as their pathologist. Dr. Scheller was required to obtain an injunction to prevent the Hospital and AMI from denying him access to the test results.

The Hospital and AMI then refused to give Dr. Scheller necessary billing information to bill his patients for the work he was performing. The trial court ruled that Dr. Scheller, as a staff physician, was entitled to this information and entered a second injunction to that effect.

This case was tried before a jury over a four week period. During trial, *at Defendants' insistence,* the jury was never informed of the injunctions. Therefore, the jury was informed of what happened to Dr. Scheller up until the first injunction was entered and not thereafter. As far as the jury knew, at the time of trial Dr. Scheller was still being denied billing information and was still being denied access to the laboratory results.

The jury resolved all factual issues in Dr. Scheller's favor as follows:

> ...(a) At the time PALM BEACH GARDENS COMMUNITY HOSPITAL, INC., entered into the contract with Fred Hobin, The Medical Staff Bylaws contained this provisions: "Any

physician holding a contract with the Hospital must be a member of the active Medical Staff?"
YES _____ NO _____

...(b) T the time they executed the contract on May 12, 1975, was it the intent of ZBIGNIEW SCHELLER and PALM BEACH GARDENS COMMUNITY HOSPITAL, INC., to incorporate that provision into their contract?
YES _____ NO _____

(c) Was it the intent of the Hospital and the Medical Staff at the time the Bylaws were adopted that this provision meant that the Hospital could not contract with a physician until that physician had been a member of the Medical Staff for at least two years and had been elevated to Active Staff membership?
YES _____ NO _____

(d) Was this provision an essential and material term or condition of the contract?
YES _____ NO _____

(e) Did the Hospital violate this provision of the contract by entering into a contract with Fred Hobin who was not a member of the active Medical Staff?
YES _____ NO _____

The jury found against the Hospital for breach of contract, and against AMI and the Hospital Administrator for interference with contract and tortious interference with contact. The jury found that Dr. Scheller's compensatory damages were $1,250,000, and awarded one Million dollars in punitive damages against the Hospital, four million dollars in punitive damages against AMI; and one million dollars in punitive damages against the Hospital Admisistrator.

The Defendants appealed to the Fourth District which directed a verdict against Dr. Scheller on all counts.

The Fourth District's decision directly and expressly conflicts with other Florida appellate decisions.

QUESTIONS PRESENTED

POINT I

THE FOURTH DISTRICT'S DECISION CONFLICTS WITH DICISIONS HOLDING:

A) IN A TORTIOUS INTERFERENCE CASE ALL THAT IS REQUIRED IS EVIDENCE OF COERCING *ONE* OF THE PARTIES TO THE RELATIONSHIP TO ABANDON IT.

The Fourth District held at page 11 of their decision that there was no evidence that any of the doctors on the Medical Staff actually breached their relationship with Dr. Scheller and therefore, no cause of action was proven. There does not have to be proof that another physician breached his business relationship with Dr. Scheller as a requisite to a cause of action for tortious interference. It is sufficient if Dr. Scheller was coerced into abandoning the relationship with the other physicians and his patients. The Fourth District's ruling is directly contrary to WEST v. TROELSTRUP, 367 So.2d 253 (Fla. 1st DCA 1979), where it was held that there must merely be evidence of coercing "*one* of the parties to the relationship to abandon the relationship." Clearly for some period of time, *at least until the injunctions were entered,* Dr. Scheller was coerced into abandoning his relationship with the other physicians and his patients. Part of Dr. Scheller's business relationship was the ability to properly bill for his services and to obtain the necessary laboratory data for review on his patients. Dr. Scheller was required to abandon his

relationship with the other physicians and his patients for the period of time that he was in fact prevented access to the lab and prevented from obtaining billing information. That interference was clearly established. Until the issuance of the two injunctions prior to trial, Dr. Scheller was compelled to abandon his position as pathologist for the staff physicians that had so designated him. Therefore the Fourth District incorrectly queried how Dr. Scheller could obtain damages for future interference when that interference had been twice enjoined. There was ample evidence of *past* interference, and because Defendants kept evidence of the injunctins from the jury, the jury allowed to believe this interference persisted in the future.

B) THAT APPELLATE COURTS MAY NOT RELY ON MATTERS NOT INTRODUCED INTO EVIDENCE BEFORE THE TRIER OF FACT: THAT THE APPELLATE COURTS CANNOT CONSIDER ISSUES NOT RAISED IN THE LOWER COURT: AND THAT A PARTY MAY NOT TAKE INCONSISTENT POSITIONS IN LITIGATION.

The Fourth District premised its decision on the tortious interference with advantageous business relationship count on the fact that Dr. Scheller had obtained two injunctions to prevent Defendants from denying him access to test relults, the lab facilities, and the billing information. Therefore, the Fourth District could not see how Sr. Scheller had sustained any *future* damages (page 10). This is in spite of the fact that the court acknowledged that the jury had not been advised of the injunctions (p.10). And the record is clear that the jury was never apprised of the

injunctions because Defendants kept this evidence from the jury. Defendants kept the jury from knowing of the injunctions, and yet on appeal they were allowed to argue that because of the injunctions, Dr. Scheller failed to prove any tortious interference and failed to prove damages. At Defendant's insistence, the jury was never informed of the injunctions and decided the case without knowing of them. On appeal Defendants informed the appellate court of the injunctions and the Fourth District decided the case in light of the injunctions.

The Fourth District's decision directly conflicts with cases that hold (1) that an appellate court may not rely on matters not introduced into evidence before the trier of fact, CERTAIN—TEED PRODUCTS CORP. v. FRAZIER, 203 So.2d 503 (Fla.2d DCA 1967); IN RE THE ADOPTION OF CHRISTOPHER LEE DAVIS v. DAVIS, 369 So.2d 89 (Fla. 1st DCA 1979); DAVIS v. ZONA, 198 So.2d 43 (Fla. 2d DCA 1967); (2) that appellate courts are not to consider issues not raised in the lower court. DOBER V. NORRELL, 401 So.2d 132 (Fla. 1981; and, (3) that a party may not take inconsistent positions in litigation to the opposing parties' detriment. FEDERATED MUT. IMPLEMENT & HARDWARE INS. CO. V. GRIFFIN, 237 So.2d 38 (fla. 1st DCA 1970).

C) THAT HOLD WHERE CONTRACT PROVISIONS ARE SUSCEPTIBLE TO MORE THAN ONE CONSTRUCTION, INTERPRETATION OF THE CONTRACT IS A QUESTION FOR THE JURY AND; THAT AN APPELLATE COURT EXCEEDS ITS PROPER SCOPE OF REVIEW OF AN ISSUE OF FACT WHEN, DESPITE CONFLICTING EVIDENCE IT SUBSTITUTES ITS OWN OPINION FOR THAT OF THE TRIER OF FACT.

Dr. Scheller testified that his contract incorporated the Bylaws. Other physicians testified how it was important to them that the Hospital not enter into a contract with a physician who had not worked on Staff for two years. The physicians wanted control over selection of contract-physicians because they were required to rely upon them daily. The physicians were operating with an unknown (i.e.), a for-profit hospital run by an international conglomerate. Therefore, they insisted that AMI and the Hospital accept their Bylaws before agreeing to continue on, or join, the Hospital Staff. AMI and the Hospital both agreed to accept and work under the Staff Bylaws. This assured the physicians that they would have a say-so in the quality of medical care rendered in spite of the profit motive.

Defendants admitted that the Staff Bylaws were incorporated into Dr. Scheller's contract but claimed that they were only incorporated to a limited extent. Dr. Scheller disagreed. It was for the jury to determine what portion of the Bylaws the parties intended to incorporate into Dr. Scheller's contract. The jury found that the parties had intended to incorporate Article IV of the Bylaws as a material provision in Dr. Scheller's contract and that the Hospital had violated it by hiring Dr. Hobin who was not on the Active Staff. This interpretation was logical, particulary in light of the fact that AMI and the Hospital were willing to make certain concessions in order to keep the existing Medical Staff But, whether it was logical or not was for the jury to determine.

The Fourth District held that there was no ambiguity in Dr. Scheller's contract and that as a matter of law the only logical interpretation was that Dr. Scheller did not have to be replaced by someone on the Active Medical Staff. The Fourth District's decision is contrary to

HOFFMAN V. TERRY, 397 So.2d 1184 (Fla. 3d DCA 1981) which holds that the correct interpretation to be given terms of a contract which are reasonably susceptible to one than one meaning constitutes an issue to be resolved by the jury, not the appellate court; and SHAW v. SHAW, 334 So.2d 113 (Fla. 1976), CONNER v. CONNER, 439 So.2d 887 (Fla. 1983), and CRIPE v. ALLSTATE FIRST NATIONAL BANK, 422 So.2d 820 (Fla.1982), which hold that a District Court exceeds its proper scope of review of an issue of fact when, despite conflicting evidence, it substitutes its own opinion for that of the trier of fact.

D) THAT TORTIOUS INTERFERENCE WITH CONTRACT CAN EXIST EVEN WITHOUT A BREACH OF CONTRACT.

On page 8 of its decision, the Fourth District stated that Dr. Scheller could not recover for tortious interference with his employment contract because there was no breach of contract. Since the Fourth District ruled that Dr. Scheller's employment contract was terminable with 90 days notice as a matter of law, and therefore had not been breached by the Hospital, it concluded there could be no tortious interference with that contract. This holding is contrary to other cases. Even if a contract is terminable at will, if a third party improperly convinces a party to the contract to terminate the contract, he can be sued for tortious interference with the contract. UNISTAR CORP. v. CHILD, 415 So.2d 733 (Fla. 3d DCA 1982). Interference with an advantageous business relationship, even in the absence of a contract, is sufficient to sustain a claim for damages under Florida law. SCUSSEL v. BOLTER, 386

So.2d 1227 (Fla. 3d DCA 1980); and the fact that a contract is void and thus unenforceable does not mean that no cause of action can exist for tortious interference with the contract. UNITED YACHT BROKERS, INC. v. GILLESPIE, 377 So.2d 688 (Fla. 1979).

E) THAT NOMINAL DAMAGES ALONE CAN SUPPORT AN AWARD OF PUNITIVE DAMAGES.

As demonstrated, *supra*, Dr. Scheller was at least entitled to nominal damages, which well support the jury's punitive awards in this case. Caselaw so holds, in conflict with the Fourth District's decision to the contrary. ELYRIA LORAIN BOND CO. v. NATIONAL COM. INDUS. INC., 300 So.2d 716 (Fla.1st DCA 1974); HARFT v. SOUTHERN BELL, 402 So.2d 453 (Fla. 3rd DCA 1981): AMERICAN MOTORCYCLE INDTITUTE, INC. v. MITCHELL, 380 So.2d 452 (Fla. 5th DCA 1980).

POINT II

THE FOURTH DISTRICT'S ORDER REFUSING TO VACATE ITS DECISION AND/OR REFUSING TO TRANSFER THIS CASE TO ANOTHER COURT FOR RESOLUTION DIRECTLY CONFLICTS WITH OTHER CASES.

Dr. Scheller filed a Motion to Vacate and/or Transfer (both En Banc and regular) because the Fourth District's decision was authored by Judge Beranek and it was subsequently learned that while sitting on this case Judge Beranek was discussing future employment with

Larry Klein,[1] one of the attorneys representing Defendants; and that subsequent to leaving the bench Beranek had gone into partnership with Larry Klein (A39-50). Judge Beranek had recused himself from sitting on other law firm's cases while discussing future employment with them (A39-50).

When the above discovered, and while this case was on rehearing, Dr. Scheller filed a Motion to vacate the Court's decision and/or transfer the case to another District Court for resolution (A39-50). The Fourth District dinied the Motion (A51-52). The Court's Order directly conflicts with DICKERSON v. PARKS, 140 So. 459 (Fla. 1932), and STATE ex rel MERKLE v. ROWE, 131 So. 331 (Fla. 1930), which hold that a litigant is entitled to nothing less than the cold neutrality of an impartial judge and that it is the duty of the courts to scrupulously guard this right.

Judge Letts stated in a specially concurring opinion that this issue is controlled by in RE ESTATE OF CARLTON, 378 So.2d 1212 (Fla. 1979) which he felt held that it was in the personal discretion of an appellate court judge to determine the sufficiency and the propriety of a request to withdraw. In this case, the request could not be made to Judge Beranek because when the above was discovered, he had left the bench. Second, can anyone doubt that if discovered while Beranek was still on the bench there would be any reasonable basis for refusing to withdraw from this case where Beranek was discussing future employment with one of the attorneys on the case.

---

[1] Since rendition of the decision, Larry Klein has withdrawn as Defendant's attorney.

POINT III

THE FOURTH DISTRICT'S DECISION REVERSING THE JURY'S FACTUAL FINDINGS AND REFUSING TO VACATE AND/OR TRANSFER DEPRIVED DR. SCHELLER OF HIS CONSTITUTIONAL RIGHTS.

The Fourth District's decision redeciding the factual issues deprived Dr. Scheller of his constitutional right to a trial by jury in violation of BESSENT v. BOARD OF BOND TRUSTEES OF SPECIAL ROAD & BRIDGE DIST. NO. 1 OF ALACHUA COUNTY, 109 So. 597 (Fla. 1926).

Likewise, the Fourth District's refusal to vacate and/or transfer deprived Dr. Scheller of his constitutional right to an impartial appellate forum in conflict with DICKERSON v. PARKS, *supra*, which holds that every litigant is entitles to the cold neutrality of an impartial judge.

CONCLUSION

The Fourth District's decision directly and expressly conflicts with other Florida appellate dicision thereby conferring jurisdiction upon this Court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been mailed to: MARK HICKS, 1414 Alfred I. duPont Bldg., Miami, FL 33131 and to MERCER K. CLARKE, 1301 Alfred I. du-Pont Bldg., Miami, FL 33131, this 4th day of APRIL, 1985.

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Attorneys for Petitioner

BY /s/ Edna L. Caruso
EDNA L. CARUSO

Supreme Court, U.S.
FILED
OCT 4 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-403

In The

Supreme Court of the United States

October Term, 1985

ZBIGNIEW SCHELLER,

Petitioner,

v.

AMERICAN MEDICAL INTERNATIONAL, INC., a foreign corporation for profit, PALM BEACH GARDENS COMMUNITY HOSPITAL, INC., a Florida corporation for profit, FREDERICK P. HOBIN, M.D., and T. R. BRUCE, JR.,

Respondents.

On Petition for Writ of Certiorari To the Florida Supreme Court

BRIEF IN OPPOSITION TO JURISDICTION

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No. 85-403

In The

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October Term, 1985

ZBIGNIEW SCHELLER,

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v.

AMERICAN MEDICAL INTERNATIONAL, INC., a foreign corporation for profit, PALM BEACH GARDENS COMMUNITY HOSPITAL, INC., a Florida corporation for profit, FREDERICK P. HOBIN, M.D., and T. R. BRUCE, JR.,

Respondents.

On Petition for Writ of Certiorari To the Florida Supreme Court

BRIEF IN OPPOSITION TO JURISDICTION

Respondents, AMERICAN MEDICAL INTERNATIONAL, INC., PALM BEACH GARDENS COMMUNITY HOSPITAL, INC., FREDERICK P. HOBIN, M.D. and T.R. BRUCE, JR., (hereinafter AMI) respectfully request that the Petition for Writ of Certiorari be denied because no federal question was preserved in the Florida State Court and because the facts of record establish that there has been no denial of Due Process under the United States Constitution.[1]

[1] Dr. Scheller's Appendix shall be designated "A. ——", while AMI's Appendix shall be designated "App. ——".

A. Jurisdiction

Rule 21.1(h) of this Court requires that the petitioner specify the appellate court in which the federal questions sought to be reviewed were raised. In the present case, Dr. Scheller purports to comply with this Rule by asserting that a Writ of Certiorari should be issued to the Supreme Court of Florida because that is the Court where the alleged federal constitutional question was first raised. There are two fundamental problems with this argument which prove that Dr. Scheller has failed to establish a jurisdictional basis for review of this case.

1. The Writ is Directed to the Wrong Court

Pursuant to 28 USC § 1257, the Supreme Court of the United States may review decrees rendered " . . . by the highest court of a State in which a decision could be had . . . ." This statute has been interpreted not to include decisions of State Supreme Courts which deny discretionary review or find that no jurisdiction exists to consider the merits of a particular case. *Interstate Circuit, Inc. v. City of Dallas,* 390 U.S. 676 (1968); *Callender v. Florida,* 383 U.S. 270 (1966). However, where a writ of certiorari is directed to the wrong court, this Court has, nevertheless, evaluated the jurisdictional issue as if it had been directed to the proper court. *Interstate Circuit, Inc., supra, Callender, supra.*

In the present case, Dr. Scheller's petition for Writ of Certiorari is directed to the Supreme Court of Florida. The Supreme Court of Florida did not decide the merits of Dr. Scheller's case. Rather, the Supreme Court of Flo-

rida simply determined that it lacked jurisdiction to hear the case because Dr. Scheller failed to demonstrate that the decision of the Fourth District "expressly and directly" conflicted with a decision of another district court of appeal or of the Supreme Court. Fla.R.App.P. 9.030(a)(2)(A)(iv), Article V, Section 3b, Florida Constitution (1980).

Undoubtedly, Dr. Scheller directed his petition for Writ of Certiorari to the Supreme Court of Florida because the first time he chose to argue a deprivation of constitutional rights was in an amended brief on jurisdiction in the Supreme Court of Florida. However, a review of that argument reveals that no deprivation of rights under the United States Constitution was claimed. (A-85). Dr. Scheller's one sentence argument was limited to a claimed violation of the Florida Constitution. (A-85). At no time during the proceedings in the Fourth District Court of Appeal did Dr. Scheller raise either a state or federal constitutional issue. As will be demonstrated below, this renders his petition before this Court fatally defective.

2. Scheller Has Failed to Preserve a Federal Constitutional Issue

In order to be entitled to raise a federal constitutional issue before this Court, it is incumbent upon a party to raise and properly preserve the federal constitutional issue in the highest state court which decided the merits of the case. *Webb v. Webb,* 451 U.S. 493 (1981); *Beck v. Washington,* 369 U.S. 541 (1962).

In *Webb, supra,* a mother was granted custody of her minor child by a Florida state court. The father was subsequently awarded custody by a Georgia state court, which award was affirmed by the Georgia Supreme Court. The mother sought certiorari in this Court on the ground that Georgia failed to give full faith and credit to the Florida decree. In dismissing the mother's appeal on the ground of lack of jurisdiction, this Court reasoned as follows:

> This Court has frequently stated that when the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary.
>
> • • •
>
> Although petitioner did use the phrase "full faith and credit" at several points in the proceedings below, nowhere did she cite to the Federal Constitution nor to any cases relying on the Full Faith and Credit Clause of the Federal Constitution.

451 U.S. at 495-96.

> [3] It is a long-settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented.

451 U.S. at 496-97.

> At the minimum however, there should be no doubt from the record that a claim under a *federal* statute or the *Federal* Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by the state law.

451 U.S. at 501.

An examination of the record in the Fourth District reveals that Dr. Scheller filed an "En Banc Motion to Vacate Court's Decision and to Transfer Case to Another District Court for Resolution". This motion argued that under *Florida law* Judge Beranek should have recused himself. Thus, Dr. Scheller argued, the decision of the Fourth District should have been vacated and the entire case transferred to another Florida District Court of Appeal for resolution. (A-55-57). No federal constitutional issues were argued in the motion and the Fourth District did not address any such issues in denying the motion. (A-66-68). Consequently, pursuant to this Court's decision in *Webb, supra,* Dr. Scheller has failed to establish the jurisdictional prerequisite to consideration of this case on the merits.

In addition, even if the jurisdictional proceedings in the Supreme Court of Florida were relevant to this issue (which is denied), it is clear from the record that no federal constitutional question was raised and preserved in that court. (A-85). Accordingly, it is respectfully submitted that no jurisdiction exists.

B. Reply to Dr. Scheller's Statement of the Case and Facts

Dr. Scheller's statement of the underlying facts on pages 4 through 6 of his brief is unsupported by any record references whatsoever. It is our position that this recitation of the facts is totally inaccurate and that the facts contained in the Fourth District's opinion correctly describe the merits of the claim filed by Dr. Scheller below. (A-5-27). However, whether the decision below

was correctly decided under Florida law is not presently before this Court. Rather, Dr. Scheller claims that he has been unfairly prejudiced because ". . . the Fourth District's decision had been authored by Judge Beranek, and it was subsequently discovered that while sitting on this case Judge Beranek had been discussing future employment with Larry Klein, one of the attorneys representing Respondents; and that subsequent to leaving the bench, Beranek had in fact gone into partnership with Larry Klein . . . ." Consequently, AMI will limit its discussion to the facts relevant to the Motion to Vacate filed by Dr. Scheller. In order to avoid repetition, we will refer to those facts in the argument section of this response.

C. Argument—The Reasons Why the Writ should be Denied

In the unlikely event this Court determines that Dr. Scheller properly preserved a federal constitutional question below, AMI contends that his "appearance of impropriety" argument is factually inaccurate and legally insufficient.

Dr. Scheller implies that because the decision was published just prior to Judge Beranek leaving the bench, he must necessarily have decided the case while negotiating his partnership agreement with Larry Klein. Thus, Dr. Scheller concludes that there was an appearance of impropriety. The problem with this surmise is that it is not supported by any *facts*.

To the contrary, the official record of the Fourth District conclusively establishes that Judge Beranek fin-

ished drafting the opinion on October 18, 1983, but the opinion was not released until July 13, 1984 (9 months later). (App. 7-8). The record also demonstrates that Judge Glickstein concluded his review of the file on November 30, 1983. The delay in publishing the opinion resulted from the lengthy period of time that Judge Rupert Smith kept the file in drafting his dissent. (App. 7-8). The Fourth District's record also establishes that Judge Beranek "noted" Judge Smith's dissent the same day that Judge Smith signed off on the file and that Judge Glickstein "noted" the dissent a few days later. (App. 7-8).

Based upon the Fourth District's own records, it is clear that the facts would not ". . . place a reasonably prudent person in fear of not receiving a fair and impartial trial." *Livingston v. State,* 441 So. 2d 1083, 1087 (Fla. 1983). A judge who decides a case nine months before he leaves the bench to go into private practice with a law firm, cannot, without more, create an appearance of impropriety. There has simply been no showing that Judge Beranek decided this case or any other case involving Larry Klein *after he decided to leave the bench and after he and Mr. Klein had substantive discussions* about forming a partnership. There is no rule of ethics or of judicial conduct which in any way makes the facts of record appear improper.

It is also significant to note that Dr. Scheller filed an extensive Motion for Rehearing from the original panel's decision. Because Judge Beranek had already left the Court, Judge Downey was assigned to the case. Judge Downey reviewed the merits of the motion for rehearing and concurred in the original panel's decision.

In addition, Dr. Scheller's Motion to Vacate requested an en banc determination by the court. Six judges of the Fourth District denied the en banc motion and two judges recused themselves from consideration of the en banc motion.

It is apparent from the foregoing that no appearance of impropriety exists in this case as a result of Judge Beranek's participation in the decision nine months prior to leaving the bench. It is also our position that actual impropriety, as opposed to an appearance of impropriety, would be necessary to establish a denial of due process. Dr. Scheller has not cited a case to the contrary. Thus, Dr. Scheller's arguments on the merits are totally without merit.

In any event, this issue was presented to the Fourth District Court of Appeal solely under Florida law and it was decided pursuant to Florida law. Consequently, this case is inappropriate for review by this Court.

———o———

CONCLUSION

Based upon the foregoing, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Attorneys for Respondent

By: MARK HICKS

APPENDIX
TO
BRIEF IN OPPOSITION TO JURISDICTION

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IN THE DISTRICT COURT OF APPEAL,
OF FLORIDA

FOURTH DISTRICT

CASE NO.: 80-1650

AMERICAN MEDICAL INTERNATIONAL INC., et al.,

Appellants,

vs.

ZBIGNIEW SCHELLER,

Appellee.

---/

RESPONSE TO EN BANC MOTION TO VACATE COURT'S DECISION AND TO TRANSFER CASE TO ANOTHER DISTRICT COURT FOR RESOLUTION

Appellants, American Medical International, Inc., et al., (hereafter AMI) oppose Dr. Scheller's so-called "En Banc Motion to Vacate Court's Decision and to Transfer Case to Another District Court for Resolution" on the following grounds:

1. Dr. Scheller seeks to have his motion to vacate and to transfer decided by this Court en banc. Rule 9.331 (a) of the Florida Rules of Appellate Procedure provides that "En banc hearings and rehearings *shall not be ordered* unless necessary to maintain uniformity in the court's decisions." Dr. Scheller did not move for a rehearing en banc and he does not contend in his en banc motion to vacate that there is a need to maintain uniformity in the court's decisions. Accordingly, since the Rules of Appellate Procedure expressly prohibit en banc hearings except to maintain uniformity of decisions, Dr. Schel-

ler's motion should be denied. In addition, Dr. Scheller has not cited a rule of procedure or statute which permits one district court of appeal to transfer a case to another district court of appeal. Thus, Dr. Scheller's motion is totally without merit.

2. The sole basis for Dr. Scheller's motion to vacate the decision of this Court is that ". . . there is an appearance of impropriety in former Judge Beranek's having rendered a decision in a case where counsel for one of the parties is an attorney with whom John Beranek was discussing future employment while sitting on the case . . . ." Dr. Scheller's motion is nothing more than a frivolous attempt to get a "second bite at the apple."

As noted in Dr. Scheller's motion, Florida law requires that a judge recuse himself where there is an appearance of impropriety. However, the standard for determining whether such an appearance of impropriety exists is that there must be ". . . *facts* alleged [which] would place a *reasonably prudent person* in fear of not receiving a fair and impartial trial." *Livingston v. State*, 8 F.L.W. 420 (Fla. 1983).

Prior to demonstrating that there are no facts upon which a reasonably prudent person could fear that Judge Beranek was not impartial in this case, AMI contends that Dr. Scheller has failed to comply with the requirements of Florida Statute § 38.10 and the Florida Rules of Civil Procedure, Rule 1.432.[1] However, even if Dr. Scheller's

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[1] For example, Section 38.10 requires a certificate of counsel that such affidavit and application are made in good faith. The affidavits mandated by the Statute and Rule require allegations of facts and not hearsay as contained in Dr. Scheller's affidavit.

motion was procedurally correct, it is totally without merit because Judge Beranek is no longer considering the case. Instead, a new judge has been, or will be, assigned to consider the motion for rehearing. Thus, the issue is moot.

In any event, Dr. Scheller's motion is legally insufficient. Dr. Scheller implies that because the decision was published just prior to Judge Beranek leaving the bench, he must necessarily have decided the case while negotiating his partnership agreement with Larry Klein. Thus, Dr. Scheller concludes that there is an appearance of impropriety. The problem with this surmise is that it is not supported by any *facts,* as required by *Livingston, supra.*

To the contrary, had Dr. Scheller bothered to look at the court file in this case, he would have found the official record of this Court which conclusively establishes that Judge Beranek finished drafting the opinion on October 18, 1983, but the opinion was not released until July 13, 1984 (9 months later). (See Exhibit A attached hereto). The record also demonstrates that Judge Glickstein concluded his review of the file on November 30, 1983. The delay in publishing the opinion resulted from the lengthy period of time that Judge Rupert Smith kept the file in drafting his dissent. This Court's record also establishes that Judge Beranek "noted" Judge Smith's dissent the same day that Judge Smith signed off on the file and that Judge Glickstein "noted" the dissent a few days later. (Exhibit A).

Based upon the Court's own records, it is clear that the *facts* would not ". . . place a reasonably prudent person in fear of not receiving a fair and impartial trial."

Livingston, supra. A judge, who decides a case nine months before he leaves the bench to go into private practice with a law firm cannot without more create an appearance of impropriety. There has simply been no showing that Judge Beranek decided this case or any other case involving Larry Klein *after he decided to leave the bench and after he and Mr. Klein* had substantive discussions about forming a partnership. There is no rule of ethics or of judicial conduct which in any way makes the facts of record appear improper.

While AMI contends that this alone justifies the denial of Dr. Scheller's motion, our position is further supported by Judge Beranek's telephone conversation with the undersigned counsel. Parenthetically, it is important to note that AMI believes that Dr. Scheller's and Edna Caruso's hearsay statements about what John Beranek said to Mr. Montgomery and Mr. Sarola are hearsay and they should not be considered in deciding this motion. However, out of an abundance of caution, the undersigned will summarize his discussions with John Beranek in the event this Court elects to consider these matters.

After Larry Klein's Motion to Withdraw was filed, counsel for Dr. Scheller called John Beranek. Mr. Beranek telephoned the undersigned to relate the substance of those conversations and he stated that he was doing so in order to be fair to both sides. Mr. Beranek stated that he told plaintiff's counsel that he had authored the opinion long before he entertained any notions of leaving the bench and that the reason the opinion was not published soon after it was drafted was because Judge Smith had not submitted his dissent to the Fourth District until the end of June, 1984. Mr. Beranek also stated that no

changes were made on the opinion after Judge Smith returned the file. Mr. Beranek further indicated that plaintiff's counsel asked him to write a letter to the Court outlining everything that had occurred.

After Dr. Scheller filed his en banc motion, the undersigned called Mr. Beranek to determine whether the following statement contained in the motion was accurate:

> "Judge Beranek suggested to counsel for Plaintiff that an alternative available, in order to avoid any appearance of impropriety, was for him to contact the Fourth District or write a letter to the Fourth District suggesting that in his opinion a rehearing should be granted in this case."

Mr. Beranek stated that he did not tell plaintiff's counsel that in order to avoid an appearance of impropriety ". . . in his opinion a rehearing should be granted in this case."

Dr. Scheller ends his argument with a request which is nothing short of ridiculous. Dr. Scheller wants this case transferred to another district court of appeal because "subconsciously" this Court might not want to rule in a manner inconsistent with Judge Beranek. Aside from the fact that no rule or statute has been cited authorizing such a transfer, there is no reasonable basis to believe that the judge assigned to rule on the motion for rehearing would have any hesitation to rule impartially on the merits without regard to any of the matters asserted in this motion.

———o———

CONCLUSION

Based upon the foregoing, it is respectfully submitted that the en banc motion should be denied.

Respectfully submitted,

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Attorneys for Appellants

By: /s/ MARK HICKS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Response to En Banc Motion to Vacate Court's Decision and to Transfer Case to Another District Court for Resolution was mailed this 11 day of October, 1984, to: MONTGOMERY, LYTAL, REITER, DENNEY & SEARCY, P. A., P. O. Drawer 3626, West Palm Beach, Florida 33402; and EDNA L. CARUSO, P. A., Suite 4B-Barristers Bldg., 1615 Forum Place, West Palm Beach, Florida 33401.

/s/ MARK HICKS

EXHIBIT "A"

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FOURTH DISTRICT

January Term 1983

CASE NO. 80-11650.

Opinion/Decision filed

AMERICAN MEDICAL INTERNATIONAL INC., PALM BEACH GARDENS COMMUNITY HOSPITAL, INC., and T. R. BRUCE, JR.,

Appellants/
Cross-Appellees,

v.

ZBIGNIEW SCHELLER and FREDERICK P. HOBIN,

Appellees/
Cross-Appellants.

Appeal from the Circuit Court for
Palm Beach County;
Edward Rogers, Judge

Appeal from the (name administrative agency).

Mark Hicks of Daniel & Hicks, Miami;
Mercer K. Clarke of Smathers & Thompson, Miami, and Larry A. Klein, West Palm Beach, for appellants.

Edna L. Caruso and Montgomery, Lytal, Reiter, Denney & Searcy, P.A., West Palm Beach, for appellees/cross-appellants.

APPEALED: Final Judgment; Amended Final Judgment: Order Granting New Trial, And Final Judgment As To Costs.

RENDERED: September 2, 16, and 17, 1980.

SUBMITTED: OA: 4/27/1983

PANEL: Associate, Smith, Rupert J. (Beranek), Glickstein

PENDING MOTIONS:

AFFIRMED/REVERSED/OTHER: Reversed

PER CURIAM OPINION/DECISION BY:

DATE CONCURRING:

Beranek 10/18/83 J.

Glickstein 11/30/83 J.

DISSENTING:

With/Without Opinion

Rupert Smith 6/26/84 J.
Beranek 6/26/84 J.
Noted J.

Glickstein 6/28/84 J.
Noted J.

CONCURRING SPECIALLY:

With/Without Opinion

J.

Noted J.

Noted J.

CERTIFICATE

I HEREBY CERTIFY that on this 15th day of April, 1985, a true copy of the foregoing Appendix was mailed to MONTGOMERY, LYTAL, REITER, DENNEY & SEARCY, P.A., P. O. Drawer 3626, West Palm Beach, FL 33402; and EDNA L. CARUSO, P.A., 1615 Forum, Suite 4-B, Barristers Building, West Palm Beach, FL 33401.

/s/ MARK HICKS

IN THE SUPREME COURT OF FLORIDA

CASE NO. 66, 655

ZBIGNIEW SCHELLER,

Petitioner,

v.

AMERICAN MEDICAL INTERNATIONAL, INC., et al.,

Respondents.

—o—

BRIEF OF RESPONDENT

—o—

Respectfully submitted,

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REPLY TO STATEMENT OF THE CASE AND FACTS

Dr. Scheller's statement of the case and facts violates one of the most cardinal rules of appellate practice—it contains no record or appendix references of any kind. This fact alone demonstrates that there has been no conflict established because Dr. Scheller was unable to rely solely on the facts contained on the face of the Fourth District's opinion. Instead, Dr. Scheller has found it necessary to create a factual scenario which is both inaccurate and unsupported by the record.

For example, Dr. Scheller states that "[t]he contract was ambiguous . . .". (Pet. Br. p. 1). However, as noted by the Fourth District in its opinion, ". . . both parties agree . . ." that the termination clause in the contract providing for ninety days written notice ". . . is unambiguous." (Pet. App. 4). In addition, the Fourth District found that "[t]he two clauses in the employment contract . . . were unambiguous and unrelated." (Pet. App. 7). Thus, Dr. Scheller's argument is based upon a premise (i.e., ambiguity) which was not the basis of the Fourth District's holding. Since it is the holding of the Fourth District that must conflict with other decisions, Dr. Scheller's brief is fatally flawed.

Dr. Scheller next attempts to obfuscate the issue of conflict by totally ignoring the facts contained in the Fourth District's opinion, while at the same time, painting his own emotional picture of a hospital motivated solely by profit. While we deny the accuracy of Dr. Scheller's accusations, it is important to point out that they were all made without record references and none relate to the issue of conflict.

On page 3, Dr. Scheller claims that he was denied access to test results and to billing information. However, as noted on page 1 of the Fourth District's opinion, the evidence actually shows that at best Dr. Scheller's performance ". . . was made more difficult or burdensome by the "billing" and "access" problems created by the hospital." The Fourth District then agreed with our "overall position" which included that the evidence established no more than Dr. Scheller was "merely inconvenienced." (Pet. App. 11). The Fourth District then went on to hold that:

> The evidence was that no doctor breached his relationship with the plaintiff. Unsuccessful interference is simply not the kind of interference upon which a tort may be founded or upon which damages may be assessed. In the context of this case, the fact that no doctor abandoned or breached the existing relationship with Dr. Scheller was of crucial significance. Since the relationships between Dr. Scheller and the 63 designated physicians remained intact, there was no cause of action proved and the court should have also directed a verdict on Count III.

(Opinion, p. 11). Thus, it is clear that Dr. Scheller did not prove interference.

ARGUMENT

REPLY TO POINT I

DR. SCHELLER HAS FAILED TO ESTABLISH A CONFLICT BETWEEN DECISIONS ON THE ISSUE OF TORTIOUS INTERFERENCE WITH HIS CONTRACT

A. There is no conflict with *West v. Troelstrup*, 367 So. 2d 253 (Fla. 1st DCA 1979).

Dr. Scheller's first argument agrees with the Fourth District's determination that none of the 63 physicians

who designated Dr. Scheller abandoned or breached their relationship with him. However, Dr. Scheller argues that, "It is sufficient if Dr. Scheller was coerced into abandoning the relationship with the other physicians and his patients." Dr. Scheller argues that the two injunctions are proof that he abandoned his relationship with the physicians. This argument is nothing more than double talk.

As noted by the Fourth District, no physician or patient abandoned or restricted his relationship with Dr. Scheller. Dr. Scheller never contended below—and all of the evidence is to the contrary—that he abandoned anyone. The case was simply not tried on that theory and it is being created solely as a tool to create conflict where none exists. Thus, since neither "one" of the parties abandoned the relationship, there is no conflict with *West v. Troelstrup,* 367 So.2d 253 (Fla. 1st DCA 1979).

Dr. Scheller's reliance upon the injunctions is also misplaced. As noted by the Fourth District, the injunctive orders were not admitted into evidence and Dr. Scheller did not raise this as an issue on appeal. Thus, the injunctive orders are not proof of anything in this case, including the existence of interference. Significantly, it has been held that findings made in preliminary injunctive proceedings, particularly those entered in other cases, are not determinative of those issues at trial. *Adoption Hot Line, Inc. v. Department of Health and Rehabilitative Services,* 385 So.2d 682 (Fla. 3d DCA 1980). Injunctive orders are not admissible to prove the existence of certain material facts at trial. *See Weak v. Weak,* 21 Cal. Rptr. 9 (Calif. 1962).

In any event, the Fourth District examined the evidence which allegedly constituted interference as to "bill-

ing" and "access" to the lab and concluded that it amounted to no more than a mere "inconvenience" and not interference with a business relationship.

B. There is no conflict based upon the general principles relating to inconsistent positions and as to matters not raised at trial.

Under this point, Dr. Scheller string cites cases which stand for the general proposition that appellate courts may not rely on matters excluded from evidence or matters not raised below and that a party may not take inconsistent positions. (Pet. Br., p. 6). Again, there is no statement of law in the Fourth District's opinion which conflicts with these rules.

Dr. Scheller claims that these principles were violated because:

> The Fourth District premised its decision on the tortious interference with advantageous business relationship count on the fact that Dr. Scheller had obtained two injunctions. . . . Therefore, the Fourth District could not see how Dr. Scheller had sustained any *future* damages. (emphasis in original) (Pet. Br., p. 5).

An examination of the Court's opinion reveals that it did not premise its decision on the injunctions:

> Both of these injunctions were issued shortly before the main trial took place. The jury was not advised of the injunctions, but appellee has placed heavy reliance on the injunctions in argument before this court. No one has raised the question of how Dr. Scheller can get damages [emphasis in original] for future interference when that very interference has been twice enjoined by the court in suits between the same parties. *Since this issue has not been raised,*

> *we do not further address it.* [emphasis supplied]. (Opinion, p. 11).

It is clear from the foregoing that the court expressly rejected consideration of the injunctions as a basis for deciding the appeal. Consequently, the predicate upon which this point rests is without merit.

In any event, assuming *arguendo* that the injunctions played a role in the holding below (which is denied), it is clear from the decision and from Dr. Scheller's brief, that such injunctions were only relevant to ". . . damages for future interference." (Pet. App. 10). The Fourth District decided the issue of *liability* against Dr. Scheller and never reached the question of the propriety of the amount of damages awarded in view of the injunctions. Consequently, the injunction issue is not legally relevant for purposes of determining conflict.

C. There is no conflict with cases which hold that ambiguities in contracts are resolved by the jury.

Dr. Scheller argues that the contract was susceptible to more than one interpretation (i.e., ambiguous) and this issue should have been resolved by the jury. In support of his position, Dr. Scheller ignores the Fourth District's opinion and details the alleged facts, which are unsupported by a single record reference.

An examination of the Fourth District's opinion reveals an extensive discussion of the termination clause (Opinion, p. 19) and the clause dealing with independent contractors (Opinion, p. 7) and the conclusion that:

> The two clauses in the employment contract, No. Seven governing independent contractors and No. Nineteen

> governing termination, were *unambiguous and unrelated.* It was improper to rule that the entire contract became totally ambiguous and totally subject to construction and interpretation by the jury by virtue of the incorporation of the by-laws which contained everything but "the kitchen sink."
>
> Even indulging the argument that the contract was subject to construction, the eventual result remains the same under other established rules of contract law. A true ambiguity does not exist merely because a contract can possibly be interpreted in more than one manner. Indeed, fanciful, inconsistent, and absurd interpretations of plain language are always possible.
>
> * * *
>
> Dr. Scheller's theory of construction renders clauses seven and nineteen irreconcilable and totally destroys the unambiguous scope and intent of the contract was obviously not to confer a lifetime benefit on Dr. Scheller. The jury should not have been allowed to render totally ineffectual the clear termination provisions of the contract. (Opinion, pp. 7, 8; emphasis supplied).

It is clear from the foregoing that the Fourth District held that the contract was not ambiguous and that the two clauses were unrelated. In addition, the court found that Dr. Scheller's interpretation would not only be absurd, but it would render the termination clause ineffectual. A holding that there is no ambiguity does not conflict with cases which say that the presence of ambiguity requires a resolution by the jury.

D. No conflict with cases which say that there can be tortious interference without a breach of contract.

Dr. Scheller claims that the Fourth District's holding that there was no tortious interference with his contract is based improperly predicated upon its holding that there was no breach of contract. Dr. Scheller then argues that

if his contract was terminable with ninety days' notice, Florida law recognizes a cause of action for tortious interference for unlawfully inducing one party to terminate such a contract.

There are several problems with Dr. Scheller's point. To begin with, Dr. Scheller sued for a tortious interference with an alleged *lifetime* contract that was breached. He did not sue for tortious interference with a contract, which was terminated upon the giving of ninety days' notice. This was simply never pleaded and never raised by Dr. Scheller as an alternative claim in the trial court. As noted by the Fourth District:

> The plaintiff's second theory of recovery, intentional interference with the contract, must fail for the same reasons as outlined above. Under this count plaintiff relies on the same lifetime contract asserting interference rather than breach. We have previously held that the plaintiff's theoretical "lifetime—no replacement" contract simply did not exist. It is *this* contract which was supposedly interfered with. (Opinion, p. 8-9). [emphasis in original].

It is clear from the foregoing that there was no breach of contract because Dr. Scheller's lifetime contract theory did not exist as a matter of law and thus, the Fourth District held that there could be no interference. This is a correct statement of the law and the cases cited by Dr. Scheller are simply not applicable.

It is also clear that on page 9 of the Fourth District's opinion, it states that assuming Dr. Scheller had claimed an interference with a contract terminable with ninety days' notice, "there was no breach of this contract even if we indulge the two hat theory", and the "plaintiff's proofs did not establish the basic elements of the cause of

action [intentional interference] and the court should have also directed a verdict on this count." (Opinion, p. 9).

There is nothing about the foregoing which states that there could be no interference with a terminable at will contract because there was no breach of that contract. Instead, the Fourth District indulged in a hypothetical and concluded that there was both no breach of a contract terminable in ninety days and no interference with such contract because the elements of the cause of action were absent under the record before it.

It is apparent that Dr. Scheller's basic premise under this point is incorrect and in any event, a hypothetical discussion—as opposed to a holding—cannot create conflict.

POINT II

THE FOURTH DISTRICT'S REFUSAL TO VACATE OR TRANSFER THIS CASE DOES NO CONFLICT WITH ANY DISCUSSIONS

Under this point, Dr. Scheller does not look to the decision of the Fourth District for conflict. Rather, he directs his conflict argument to a denial of his "motion to vacate and/or transfer", based upon the fact that Judge Beranek went into partnership with Larry Klein after the bench.

The simple answer to this point is that conflict can only be established by demonstrating that the Fourth District's decision "expressly and directly conflict[s] with a decision of another district court of appeal or of the Supreme Court on the same question of law." Florida Rules of Appellate Procedure, Rule 9.303(a)(2)(iv). This point involves the denial of a motion by the Fourth District and

has nothing to do with its holding. Thus, no conflict can exist.

In any event, a detailed discussion of this issue is contained in AMI's "Response to En Banc Motion to Vacate Court's Decision and to Transfer Case to Another District Court for Resolution." (AMI's App. 1-5). A summary of that response is as follows:

(a) The so-called "en banc" motion was not filed timely.

(b) The record showed that Judge Beranek wrote the majority opinion nine months before it was released and the delay in publishing the opinion was caused by the length of time that Judge Rupert Smith kept file in drafting his dissent. This does not create an appearance of impropriety.

(c) Judge Downey was assigned to the case after Judge Beranek left the bench. He considered all post decision motions and he agreed with the holding of the original panel in thise case.

(d) There is no legal authority which allows one district court of appeal to transfer a case to another district court of appeal.

CONCLUSION

Based upon the foregoing, it is respectfully submitted that no conflict exists and Dr. Scheller's petition should be denied.

Respectfully submitted,

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By /s/ Mark Hicks

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of April, 1985, a true copy of the foregoing Brief of Respondents was mailed to MONTGOMERY, LYTAL, REITER, DENNEY & SEARCY, P.A., P. O. Box 3[illegible] West Palm Beach, FL 33402; and EDNA L. CARUSO, ESQ., 1615 Forum Place, Suite 4B, Barristers Bldg., West Palm Beach, FL 33401.

/s/ Mark Hicks

IN THE SUPREME COURT OF FLORIDA

CASE NO. 66,655

ZBIGNIEW SCHELLER,

Petitioner,

AMERICAN MEDICAL INTERNATIONAL, INC., et al.,

Respondents.

RESPONSE TO AMENDED BRIEF OF PETITIONER ON JURISDICTION

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RESPONSE TO AMENDED PORTIONS OF JURISDICTIONAL ARGUMENT

On page 8 of Petitioners brief, Dr. Scheller added a section E which argues that the Fourth District's opinion conflicts with those cases which hold that nominal damages are sufficient to support an award of punitive damages.

The basic fallacy in Dr. Scheller's argument is that the Fourth District decided the issue of *liability* against him and never reached the issue of damages.

Accordingly, no conflict can possible exist.

On page 9, Dr. Scheller adds a new Point III, which argues that he has been denied his constitutional right to a jury trial and to an impartial appellate forum.

The Fourth District's opinion does not discuss any constitutional issues. It simply decided this case on the merits applying established rules relating to direct verdicts. Thus, there can be no conflict of decisions.

CONCLUSION

Based upon the foregoing, it is respectfully submitted that no conflict exists and Dr. Scheller's petition should be denied.

Respectfully submitted,

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